

Judgment 2/2009

**Garnet Investments Ltd (Plaintiff) v BNP Paribus (Suisse)
SA (Defendant) and the Government of the Republic of
Indonesia (Third Party) – Court of Appeal (Civil Appeals
389 and 400) - 9 January 2009**

Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987 (ss.1 and 4) – Freezing and disclosure order – appeal from grant and continuation of the freezing order – cross-appeal from stay of the disclosure order – authorities considered on 'just and convenient' – relevant principles for grant of freezing relief by secondary court - 'exceptional circumstances' had to be established under s.1(7) – risk of dissipation – litigation pursued in Indonesia – applicants for freezing orders must make full and frank disclosure of the problems they face – appeal allowed and injunction and disclosure orders discharged – application for leave to appeal to the Judicial Committee of the Privy Council, and for stay pending such appeal, dismissed (See Judgments 13/2007, reported at 2007-2008 GLR 73, and 33/2008)

IN THE COURT OF APPEAL IN THE ISLAND OF GUERNSEY

Civil 389 and 400

The 9th day of January, 2009 before Geoffrey Robert Rowland, Bailiff, President, Geoffrey Charles Vos QC and Miss Clare Patricia Montgomery QC

GARNET INVESTMENTS LIMITED

Plaintiff/Appellant

-v-

BNP PARIBAS (SUISSE) S A

Defendant/First Respondent

and

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA

Third Party/Second Respondent

In the matter of the appeals, with leave, by the Plaintiff and by the Third Party respectively arising from decisions made by the Royal Court on 23 May 2007 and 29 August 2008;

THE COURT, having on 15 and 16 December 2008 heard Advocates C H Edwards for the Plaintiff, T Corfield for the Defendant and S H Davies for the Third Party, thereon, this day DELIVERED its reserved JUDGMENT in the terms attached hereto and: -

1. AFFIRMED the said decision of the Royal Court on 23 May 2007 to continue the freezing injunction;
2. ALLOWED the appeal in part against the said decision made on 29 August 2008 and HELD that the Royal Court should have discharged the freezing injunction with immediate effect on 29 August 2008; and
3. DISCHARGED both the freezing injunction and the disclosure orders against the Plaintiff;

AND THE COURT, having heard counsel further thereon, DETERMINED applications by the Third Party in the terms attached hereto and: -

1. ORDERED the Third Party to pay the costs of all the applications for the freezing injunction in the Royal Court, and the costs of the appeal, to be calculated on the standard recoverable basis and to be taxed if not agreed;
2. DISMISSED the application by the Third Party for leave to appeal to the Judicial Committee of the Privy Council; and
3. DISMISSED the application by the Third Party for a stay of the discharge of the freezing injunction or a re-grant of that injunction pending an application to the Judicial Committee for leave to appeal.

K H TOUGH
Registrar of the Court of Appeal

**Approved Judgment
9 January 2009**

**IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY
(CIVIL DIVISION)**

Friday 9 January 2009

ON APPEAL FROM DECISIONS OF THE ROYAL COURT OF GUERNSEY

Before:

Geoffrey Robert Rowland, Bailiff and President of the Court of Appeal
Geoffrey Charles Vos QC
Clare Patricia Montgomery QC

Between:

Garnet Investments Limited

Plaintiff

- and -

BNP Paribas (Suisse) SA

Defendant

The Government of the Republic of Indonesia

Third Party

Advocate Christopher H. Edwards for the Plaintiff, Garnet Investments Limited.

Advocate Tim Corfield for the Defendant, BNP Paribas (Suisse) SA.

Advocate Simon H. Davies for the Third Party, the Government of the Republic of Indonesia.

Cases

Credit Suisse Fides Trust v. Cuoghi [1998] Q.B. 818

Refco v. Eastern Trading Company

Fourie v. Le Roux [2007] 1 W.L.R. 320

Kaduna Limited v R. Durnell & Sons Limited Civil appeal 334: 18th December 2003)

Reid et al. v. European Internet Capital Limited Civil Appeal 314 and 316: 5th July 2002

Erinford Properties v. Another and Cheshire County Council [1974] 1 Ch 261 at page 267ff

Texts

The Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987 (Section 1(7))

The Supreme Court Act 1981 (Section 37(1))

The Civil Jurisdiction and Judgments Act 1982 (Section 25)

The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law 1999 as amended (Section 39)

The Court of Appeal (Guernsey) Law 1961 (Section 16)

Judgment

The Bailiff of Guernsey: I will invite Vos JA to deliver the first judgment.

Vos JA:

Background

1. Garnet Investments Limited (“Garnet”), a company incorporated in the British Virgin Islands, is beneficially owned by Hutomo Mandala Putra, also known as Tomi Soeharto, (“Mr Putra”), the fifth child and third son of Haji Mohammed Soeharto (“Mr Soeharto”), who ruled the Republic of Indonesia, as its second President, from 12th March 1967 to 21st May 1998, just over 31 years. Mr Soeharto died on 27th January 2008.
2. Time magazine’s Asian edition of 24th May 1999 reported that Mr Soeharto’s family fortune amounted to US\$15 billion or more, and suggested that illicit movements of deposits had been made just after Mr Soeharto fell from power. Mr Soeharto sued Time magazine for libel, but his action failed. The same Time article also suggested that Mr Putra controlled some 60 important companies and put his personal wealth at around US\$800 million. Mr Yoseph Suardi Sabda (“Mr Sabda”) included these figures in his first affidavit used in support of the Government of the Republic of Indonesia’s (the “Government”) initial application for a freezing order.
3. On 22nd September 2000, the Supreme Court of Indonesia found Mr Putra guilty of corruption in what was known as the ‘Goro’ case. It sentenced him to 18 months imprisonment and fined him RP30.6 billion.
4. Mr Putra went on the run, and was later convicted of planning the murder, on 26th July 2001, of the Supreme Court Judge who had found him guilty. On 20th November 2001, the Supreme Court verdict against Mr Putra was quashed.
5. On 26th July 2002, the First Instance Court sentenced Mr Putra to 15 years imprisonment for murder, fleeing justice, and illegal possession of firearms. That sentence was later reduced to 10 years.
6. Mr Putra was released from jail in October 2006, and has, according to Advocate Christopher Edwards, for Garnet, lived at all times since then in Indonesia, not least because, until very recently, he was prevented from travelling outside Indonesia by the terms of, what we would call, his parole.

The appeal in this case

7. Mr Putra opened an account with the Defendant bank (the “Bank”) in the name of Garnet, on 22nd July 1998, some two months after the removal of Mr Soeharto. In due course, 3 sub-accounts were opened with the Bank in Garnet’s name (the “Accounts”).
8. There is now some E37 million in the Accounts, which is affected by a freezing order first made by Lieutenant Bailiff Carey on 22nd January 2007.
9. Garnet has now appealed against the grant and continuation of that freezing order, and the Government has cross-appealed against the imposition of a stay on the disclosure order also made against Garnet. Leave to appeal was granted by the Lieutenant Bailiff

Factual summary

10. It appears that some, at least, of the monies paid into the Accounts came from two transactions:-
- (1) On 23rd July 1998, V Power Corporation, a Bahamian company owned by Mr Putra, sold its shareholding in Lamborghini to Audi AG for US\$48 million.
 - (a) On 6th October 1998, V Power transferred the sum of US\$47.5 million to Garnet.
 - (b) On 11th February 1999, V Power transferred a further US\$500,000 to Garnet.
 - (2) On 29th May 1998, Motorbike International Limited (“Motorbike”), a company owned by Mr Putra, sold 50% of its shares in Superbike International Limited (“Superbike”), to Modar Limited (“Modar”). Subsequently, Motorbike sold the remainder of its shares in Superbike to Modar.
 - (a) Motorbike received US\$18.5 million from Modar.
 - (b) On 12th February 1999, Motorbike transferred US\$10.25 million to Garnet.
 - (c) On 30th June 1999, Motorbike transferred a further US\$1,680,491 to Garnet.
11. The Minutes of a meeting of the board of directors of Garnet on 13th May 2002 record that a further £8 million was loaned by Mr Putra to Garnet in August and September 1998. It appears that this sum may also have been paid into the Accounts, although Garnet has provided no explanation as to its origins, saying only that Mr Putra cannot now recall.
12. According to Garnet’s representative, Mr Otto Cornelis Kaligis (“Mr Kaligis”), Motorbike held US\$10 million (which may have been the balance of the proceeds of the sale of Superbike shares) in an account with the Bank in 2002. The Bank expressed concerns about the origin of this US\$10 million, and the matter was discussed between representatives of Motorbike, the Bank and the Government. The outcome was:-
- (1) A letter dated 4th April 2005 from the Minister of Law and Human Rights of the Government to the Bank saying that Mr Putra was not the subject of any suspicious transaction report or any civil or criminal proceedings in Indonesia in relation to the origin of the funds held by Motorbike.
 - (2) At the Bank’s insistence, Motorbike’s US\$10 million was paid to the Government, which itself transferred the funds back to Motorbike, as confirmed by a letter dated 25th April 2005 from the Director General of Public Legal Administration of the Government to Motorbike.
13. On 28th October 2002, Garnet instructed the Bank to make three payments totalling about E36.46 million from the accounts. The Bank refused to comply with this instruction but sought further information. On 1st November 2002, the Bank notified the Financial Intelligence Service (“FIS”) of this instruction.
14. In due course, on 28th February 2003, the Plaintiff instructed the Bank to pay all the money in the Accounts, save for US\$1 million, to the United Overseas Bank Limited, Singapore (the “Instruction”). The Instruction was stated to supersede all previous instructions. On the same date, the Bank declined to comply with the Instruction saying that it was concerned that “*the present (or a future) Government [of Indonesia] might be able to lay claim to the moneys in*

the accounts at issue". At no time, has the FIS consented to the Instruction being complied with.

15. On 3rd March 2006, some 3 years later, Garnet commenced this action (the "Action") seeking declarations that the Instruction should be complied with.
16. On 21st July 2006, the Bank applied for a stay of the Action, and for various other directions.
17. On 13th September 2006, Lieutenant Bailiff Carey directed that the Bank should write to the Government enquiring whether it wished to assert any claim to the funds held for Garnet by the Bank.
18. On 20th October 2006, the Government wrote to the Greffier of the Royal Court declaring that it "*wishes to assert claim to the funds held by the [Bank]*". In fact, however, the Government has not yet instituted any proceedings asserting any proprietary claims to the monies in the Accounts.
19. On 22nd January 2007, the Government applied for and obtained relief from the Court including:-
 - (1) It was joined to the Action as third party.
 - (2) An injunction restraining Garnet until further order from disposing of or dealing with the monies in the Accounts, save in respect of legal advice and representation.
 - (3) It was ordered that the Court should review the injunction on 8th March 2007, some 6 weeks later.
20. On 5th March 2007, the Government applied to extend the injunction, and to require Garnet to disclose all its worldwide assets. It also applied for an order requiring the Bank to disclose details and documents relating to the current and historic beneficial ownership of Garnet, and documents relating to all transactions by which monies were transferred into or out of the Accounts.
21. On 8th March 2007, Lieutenant Bailiff Carey continued the injunction, and adjourned the disclosure applications to a hearing in May 2007.
22. There was a substantive *inter partes* hearing before Lieutenant Bailiff Carey between 14th and 17th May 2007.
23. On 23rd May 2007, Lieutenant Bailiff Carey continued the injunction that he had granted on 22nd January 2007. He wholly refused the Government's application for disclosure against the Bank, but granted some of the disclosure sought against Garnet, requiring it to verify more authoritatively the affidavit evidence of Messrs Kadir and Shepherd as to the origin of the monies in the Accounts, and to disclose what other assets Garnet had held during its existence. The Lieutenant Bailiff granted leave to appeal to both Garnet and the Government, and stayed the disclosure order against Garnet pending appeal.
24. At the time of the May 2007 hearing, no civil or criminal proceedings had been issued by the Government against Garnet or Mr Putra, notwithstanding that some 9 years had elapsed since the collapse of Mr Soeharto's government. Lieutenant Bailiff Carey was concerned at the Government's delay in bringing such proceedings, and held that the Order he made should be supervised. To this end, he required the Government to undertake that it would commence proceedings within 3 months from the date on which the injunction had become effective (i.e.

from the 23rd May 2007), and he ordered that the first review of the injunction should take place 6 months after the May 2007 judgment.

25. On 22nd August 2007 (the day before the end of the 3 month period), Perusahaan Umum Bulog (“Bulog”) issued proceedings against Mr Putra in the District Court of South Djakarta, relating to the P.T. Goro property transaction claiming some Rp500 billion (the “P.T. Goro claim”). These proceedings were dismissed on 28th February 2008. Thereafter, on 19th March 2008, the parties reached a drop hands settlement.
26. In late March 2008, the matter came first before this Court, but was adjourned because the P.T. Goro claim had just been compromised, and the parties wanted to adduce further evidence. In the result, the parties agreed that the matter would be best progressed in the first instance, in view of the new circumstances, by an application to discharge the injunction before Lieutenant Bailiff Carey, rather than by a substantive appeal.
27. Eventually, on 13th May 2008, Garnet applied to discharge the injunction. Lieutenant Bailiff Carey adjourned the application to enable the Government to file evidence in response. The substantive hearing of the application to discharge was on 22nd and 23rd July 2008. By his judgment of 29th August 2008, Lieutenant Bailiff Carey ordered that the injunction should continue until a final end date of 23rd May 2009, by which time he envisaged that there would have to be a judgment in Indonesia which could be enforced against the monies in the Accounts; otherwise, the injunction would simply disappear.
28. After further argument, in a judgment dated 3rd October 2008, Lieutenant Bailiff Carey declined to lift the stay pending appeal that he had imposed on the disclosure orders made against Garnet.
29. Thus the present position is that the injunction remains in place, unless we discharge it, until 23rd May 2009, and the disclosure orders against Garnet, unless we discharge them, will take effect after the disposal of this appeal.

Introduction to the claims against Mr Putra

30. The claims that the Government makes against Garnet or Mr Putra, who owns Garnet, are obviously crucial to the Court’s ability to grant a freezing order against Garnet. It has not been seriously suggested that the distinction between Mr Putra and Garnet, a company he admits to owning and controlling, should affect the way we view these issues.
31. In the original evidence before the Lieutenant Bailiff, there were many claims intimated, some of which were very unspecific. In essence, however, the Government contended that Mr Putra had been involved in “KKN”, which in English is “corruption, collusion and nepotism”. I shall not deal here with the numerous claims that have been suggested but not brought, but they are set out in the Lieutenant Bailiff Carey’s first judgment at paragraphs 24-39.
32. The following 4 claims have, however, assumed greater importance in this appeal, because they have been either seriously intimated or actually brought against Mr Putra or his family:-
 - (1) The P.T. Goro claim, which was commenced on 23rd August 2007, and finally compromised without Mr Putra accepting any liability on 19th March 2008.
 - (2) The TPN claim filed by the Ministry of Finance of the Government against Mr Putra and others in the Central District Court of Jakarta seeking compensation of some Rp 4 trillion. The TPN claim relates to the PT Timor Putra Nasional car programme.

- (3) The Supersemar claim for at least US\$100 million, which presently stands dismissed, but under appeal, and to which Mr Putra is not yet a defendant.
- (4) The BPPC clove monopoly claims, in which Mr Putra was at some stage named as an official suspect in a criminal investigation.

33. I shall deal in a little more detail with each of these claims in turn.

The P.T. Goro claim

34. I have set out the basic elements of the P.T. Goro claim above. As noted there, the proceedings were dismissed on 28th February 2008, and on 19th March 2008, the parties reached a drop hands settlement.
35. Two other potentially important aspects of the P.T. Goro claim may affect this Court's decision:-
 - (1) First, the claim made was dismissed by the Court on a basis which suggested that it might have been brought in bad faith.
 - (2) Secondly, it now appears to be common ground that the Government applied for a freezing order to protect this claim, and that application was refused by the Indonesian Court.
36. The P.T. Goro claim was dismissed in a 155 page judgment of the South Jakarta District Court dated 11th March 2008. As Lieutenant Bailiff Carey remarked at paragraph 12 of his August 2008 judgment, the translation is a rough one. That said, however, it seems to me clear from the transcript we have that the District Court thought that:-
 - (1) The claim for a debt of some Rp5.8 billion was ill-founded because it had already been paid.
 - (2) The compensation payment claimed of some Rp4.7 billion had also been paid prior to the proceedings.
 - (3) The Rp52.2 billion claimed seems to have been returned by the transfer of land to the Plaintiff, Bulog.
37. The outcome of the claim was that it was dismissed and Mr Putra was awarded Rp5 billion (US\$500,000) compensation. This amount was eventually compromised as part of the drop hands settlement achieved.
38. Advocate Simon Davies, for the Government, points out that it is strange that the judgment should have awarded compensation to Mr Putra for loss of his reputation (1612), when he had only recently served a lengthy prison sentence for the murder of the judge, who had found him guilty of corruption in relation to the same facts.
39. Mr Sabda seems to have suggested that this outcome was the result of further corruption, but the lawyers acting for Bulog were from his own Government office, and, of course, the regime in Indonesia had long changed since 1998.

The TPN claim

40. The allegations seem to be, in the broadest outline, as follows:-
 - (1) TPN was substantially beneficially owned by Mr Putra.

- (2) TPN owed some US\$469 million to the Government.
 - (3) PT Vista Bella Pratama (“Vista Bella”) bought the debt owed by TPN to the Government from the Government for about US\$40 million (some 10% of its value), thus effectively releasing TPN’s obligations to the Government.
 - (4) The money used by Vista Bella to purchase the debt was provided by Humpuss, a company controlled by Mr Putra, (as to at least US\$12 million) and by Mr Putra’s “*close associates*”, through P.T. Mandala Buana Bhakti (a company established by those associates).
 - (5) The Government contends that it was unaware of Vista Bella’s connection with Mr Putra.
41. Mr Sabda for the Government contends that there is a good arguable case that the debt sale agreement should be avoided, and that the Government will be able to look behind that transaction and claim against Mr Putra on a pre-existing personal guarantee for some US\$260 million, and as a shareholder in TPN under the original debt (paragraph 8.7 of his 4th affidavit).
42. Garnet submits:-
- (1) That avoidance of the debt sale agreement between the Government and Vista Bella must have actually occurred, before there can be any claim against Mr Putra personally.
 - (2) That the Government was not even aware of the TPN claim until December 2007, long after the injunction was granted.
- In oral argument, however, Mr Edwards accepted that this relief did not have to be granted in a two-stage process, but would form part of a single action.
43. It may also be noted that the TPN proceedings were issued on 5th May 2008, 3 days after Mr Sabda’s 4th affidavit, and 3 days before 8th May 2008 hearing.
44. Lieutenant Bailiff Carey found at paragraph 33 of his 29th August 2008 judgment that the TPN proceedings were not without substance.
45. The evidence that we directed should be filed after the hearing suggests that the TPN claim may shortly be decided at first instance, but that the two tiers of appeal could take something approaching 3 years to conclude.

The Supersemar claim

46. The broad outline of the allegations are as follows:-
- (1) The Supersemar Foundation was a ‘yayasan’ or charitable foundation, in which Mr Soeharto was involved.
 - (2) In July 2007, the Government started proceedings against Mr Soeharto claiming that the Foundation’s monies had been misused.
 - (3) Mr Soeharto died in January 2008, and all his heirs (except Mr Putra) have taken over the defence of the Supersemar claim.

- (4) The District Court of South Jakarta has ruled that the Foundation should repay the Government some US\$100 million, but that Mr Soeharto (and therefore his heirs) are not legally responsible for the Foundation's illegal acts.
 - (5) The Government is appealing this decision.
47. The Government argues that:-
- (1) Mr Putra has been summoned to appear as a defendant to this case, but has so far failed to do so.
 - (2) Mr Putra will not be permitted to disclaim his inheritance and, thereby, to avoid participating as a defendant to the Supersemar claim.
 - (3) The Government's appeal from the District Court's decision will be successful.
48. Garnet submits that it is hard to see how Mr Putra's eventual liability could exceed his share of his father's estate. This point was endorsed by Lieutenant Bailiff Carey at paragraphs 15 and 34 of his 29th August 2008 judgment, and it was for that reason that he would not have been willing to extend the injunction, had this been the only claim.

The BPPC clove monopoly claims

49. These claims have not yet resulted in any legal proceedings against Mr Putra, although Mr Putra was at some point officially named as a suspect in a criminal investigation. We were told by Mr Edwards that Mr Putra ceased to be an official suspect some 2 weeks before the hearing on 15th and 16th December 2008.

Other claims against Mr Putra

50. Mr Sabda has dealt in his 5 lengthy affidavits with numerous other putative or possible claims that the Government could bring against Mr Putra. None of these other claims has yet been instigated. And it is now more than 10 years since investigations began after the collapse of Mr Soeharto's government in 1998.
51. In the course of the hearing, Mr Davies confirmed on behalf of the Government:-
- (1) There are no extant criminal investigations into Mr Putra's activities in Indonesia.
 - (2) There are no other extant civil claims by the Government against Mr Putra or Mr Soeharto's estate, whether in Indonesia or overseas, apart from those dealt with above.
 - (3) There may be more civil proceedings to be brought by the Government against Mr Putra in the pipeline.

Freezing and conservatory orders in Indonesia

52. There was considerable debate at the hearing about precisely what freezing orders, if any, had been sought in Indonesia against Mr Putra. This issue seems to be the subject of conflicting evidence: Mr Sabda's 5th affidavit and Mr Kaligis's 5th affidavit.
53. What is notable, however, is that in both of the crucial sets of proceedings in Indonesia, freezing or conservatory injunctive relief is claimed:-

- (1) In the P.T. Goro claim, the document we would call a “Statement of Claim” expressly sought seizure of the Accounts in the name of Garnet, and mentioned no other specific assets of Mr Putra.
 - (2) In the “Statement of Claim” in the TPN claim, a conservatory seizure is requested in respect of all Mr Putra’s assets, but only the Accounts and the Timor Car factory are expressly mentioned.
54. Mr Kaligis’s 5th affidavit says at paragraph 27: “...I draw the Court’s attention to the fact that, both in the Bulog Case and the TPN Case, the [Government] has sought injunctive relief. In the Bulog case it was refused and in the TPN case, the hearing has not yet taken place”.
55. Mr Sabda, in reply, says the following under the heading “(2) the alleged failure by the Government to obtain injunctive relief in Indonesia and (3) the existence of assets belonging to Mr Putra in Indonesia which have not been frozen by the Government”:-
- “21. It is difficult to obtain a freezing injunction in Indonesia on an interlocutory basis in civil proceedings. The Government has previously applied for injunctive relief in both the PT Goro and the TPN proceedings. However, as it was not considered that the Government could show a clear enough risk of dissipation in relation to the assets those heads of relief were or will be determined at the final hearing in those proceedings. If it becomes apparent that there is a risk of dissipation the Government would then be able to justify seeking an interlocutory injunction as it has done in Guernsey.*
- 25 ... Mr Kaligis overlooks the fact that the Government cannot presently demonstrate a risk of dissipation of Mr Putra’s shares in Humpuss, and therefore cannot justify bringing an application for an interlocutory injunction at this time”.*
56. Mr Sabda’s affidavit is inaccurate and imprecise. It was sworn on the 22nd July 2008, long after the Goro proceedings had been compromised in March 2008. Yet he says clearly that the injunctive relief “those heads of relief were or will be determined at the final hearing in those proceedings”. It is simply unclear whether, in fact, an application for interlocutory freezing orders was refused or never applied for in the P.T. Goro claim. But plainly no freezing relief was granted in the P.T. Goro claim at the final hearing, when the claim was dismissed.

The issues

57. The main issues that are required to be determined in this appeal may be summarised as follows:-
- (1) Did section 1(7) of the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987 (“section 1(7)”) apply to the application for freezing relief made by the Government, so that ‘exceptional circumstances’ had to be shown before an injunction could lie?
 - (2) If section 1(7) applied, what is meant by ‘exceptional circumstances’?
 - (3) In relation to each of the two judgments made on (a) 23rd May 2007 and (b) 29th August 2008, was the Lieutenant Bailiff right to find that there was a good arguable case against Mr Putra?

- (4) In relation to each of the two judgments made on (a) 23rd May 2007 and (b) 29th August 2008, was the Lieutenant Bailiff right to find that there was a risk that Garnet might dissipate its assets?
- (5) In relation to each of the two judgments made on (a) 23rd May 2007 and (b) 29th August 2008, was the Lieutenant Bailiff right to find that it was just and convenient to extend the injunction?
- (6) If the point had been argued, would there have been exceptional circumstances on 23rd May 2007? Was the Lieutenant Bailiff right to find on 29th August 2008 that, if section 1(7) applied, exceptional circumstances had been shown?
- (7) Was the Lieutenant Bailiff right on 29th August 2008 to extend the injunction to a fixed date of 23rd May 2009, when it would lapse?
- (8) Was the Lieutenant Bailiff right to continue the stay on the disclosure order on 29th August 2008, pending appeal?

58. There is now no dispute that the Judge had jurisdiction to grant a freezing order.

Overview of the facts and issues

59. It is no exaggeration to say that this case is puzzling and somewhat troubling. It is a case in which I was left, after the argument, with the clear impression that neither side either had been or felt able to be entirely frank or open with the Court. I will try to explain why this was the case.
60. The primary plank of the Government's case, as advanced to the Royal Court was, as Mr Sabda deposed on 19th January 2007: "*...it is reasonable to infer that Mr Putra's vast personal wealth is derived from his abuse of the positions of authority and influence which he enjoyed during his father's 31 year rule of Indonesia*". Mr Sabda had quoted in the same affidavit, without demur, the Time article that had alleged that Mr Putra controlled some 60 [major] companies [in Indonesia], and was worth around US\$800 million, and that Mr Soeharto had been worth at least US\$15 billion. He exhibited lists of these major companies.
61. In the course of arguing this appeal, however, the Government back-tracked from this position for the purpose of arguing that an injunction was 'just and convenient', by suggesting that it knew nothing of Mr Putra's personal wealth, and that there was a real possibility that any judgment it obtained in Indonesia might go unsatisfied. The Government adopted this position whilst, at the same time, contending that Mr Putra was one of the heirs to his father's huge estate and would therefore be forced to join as a defendant to the Supersemar proceedings brought against his late father.
62. The two positions cannot both be right. Either Mr Putra is massively wealthy in Indonesian assets and will be able to satisfy any claims that are successfully pressed against him, or he is not. If he is not, then there may be a case for suggesting that the Government is at risk of finding itself with an unfulfilled judgment.
63. So far as Mr Putra is concerned, he too was coy about the full extent of his assets; though I pause to note that he had no formal burden of proof upon him. Mr Putra adduced evidence to show that his interest in PT Humpuss was worth somewhere between approximately US\$157 million and US\$201 million in June 2008. We do not know what its value may now be after the financial crisis of the last 4 months of 2008. When pressed, Mr Edwards suggested that wealthy businessmen were often coy about their assets and he could not be expected to make full public disclosure of the extent of his wealth. He did not, however, contest the figures and

information as to the wealth of Mr Putra and his father that Mr Sabda had given in his first affidavit.

64. This is not the only troubling feature of the case. It will be reasonably obvious from a study of the facts set out earlier in this judgment that the proceedings in Guernsey have prompted a huge amount of activity from the Government, which would apparently not otherwise have occurred.
65. Only after the Lieutenant Bailiff extracted an undertaking from the Government on 23rd May 2007 were civil proceedings started against Mr Putra for the first time. It seems that the Government thought that the P.T. Goro claim was its best shot. But as I have pointed out already, the claim was lost – and lost badly – and eventually compromised with no payment being made.
66. The next thing that happened was the commencement of the TPN claim in Indonesia, days before an expected return date of the injunction in Guernsey. Again, it appears that the one event was tailored to the other.
67. Moreover, it is surprising that, in both sets of proceedings, specific mention is made of the Guernsey Accounts. It is the only asset mentioned specifically as requiring seizure in the T.P. Goro claim, and one of two assets mentioned as requiring “*conservatory seizure*” in the TPN proceedings. Whilst it is true that the Supersemar claim was started against Mr Soeharto in July 2007, the claim has been continued after his death against his heirs.
68. My conclusion is that the Government’s proceedings against Mr Putra have been largely, if not wholly, inspired by the Guernsey Court’s invitation in September 2006 to state whether the Government wished to assert any claim the monies in the Accounts. This aspect seems to have troubled Lieutenant Bailiff Carey as well, when he said in paragraph 59 of his 23rd May 2007 judgment: “*It is not appropriate for the Government ... to give the appearance of trying to use this small jurisdiction as the lead forum for taking proceedings against Mr Putra*”.
69. When asked why the Government was directing so many resources and such great attention on the monies in Guernsey, Mr Davies was wholly unable to provide any satisfactory answer. Of course, Mr Sabda makes it clear repeatedly in his affidavits how difficult it is to investigate fraud and corruption, and to an extent one accepts that proposition. But in this case, where it has always been asserted that Mr Putra and his family were believed to be massively wealthy and were in control of major Indonesian industries, it is hard to understand why the only active steps taken by the Government to assert what they claim to be their rights, are directed at a small jurisdiction where they have fortuitously been asked to consider making a claim to a sum that is relatively (and I stress relatively) small compared to the vast wealth the alleged wrongdoers are said to have amassed.
70. I can only conclude that there is much that the Government has been unwilling to tell both us and the Royal Court about the difficulties in bringing proceedings in Indonesia against the Soeharto family, and that the truth may well be rather different from the picture that Mr Sabda has painted. I cannot and will not speculate about where that truth may lie, but it seems at least possible that there is limited political will to take steps in Indonesia in relation to the alleged corruption, and that the substantive claims may be more difficult to conclude favourably for the Government than is presently being admitted.
71. This possibility is given some foundation by what happened before Lieutenant Bailiff Carey, when Advocate Strappini was acting for the Government on the original application for the injunction on 22nd January 2007. Paragraph 58 of the Lieutenant Bailiff’s 23rd May 2007 judgment described how Mr Strappini had made the revealing comment that “*the problem*

facing the Government was that the Soeharto family by virtue of the fact that they had a lot of money still in their possession, had great influence in Indonesia”.

72. For the purposes of this appeal, however, we can only take hard facts, and proper inferences therefrom, into account. It may be useful to summarise those that I consider most important:-
- (1) It has always been the Government’s case that Mr Putra has huge wealth in Indonesia.
 - (2) No proceedings were brought against Mr Putra before the Guernsey Court required an undertaking that they be initiated.
 - (3) No successful application has been made in Indonesia to freeze Mr Putra’s Indonesian assets.
 - (4) No steps have yet been taken in any other overseas jurisdiction to institute civil proceedings or to trace or freeze the alleged overseas assets of either Mr Soeharto or Mr Putra.
 - (5) The claim that the Government started first against Mr Putra wholly failed, despite great confidence being expressed by the Government in its merits. In the absence of any real evidence as to present corruption in the Indonesian Courts or elsewhere, I can only presume that proceedings in Indonesia are conducted regularly and properly and that the case was determined on its merits.

The statutory provisions in Guernsey and England

73. In order properly to understand the authorities that bear upon our decision, it is important to make a direct comparison between the statutory position in the two jurisdictions.
74. In Guernsey, the primary legislation is the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987 (the “LRMPG Law”), which provides as follows:-
- (1) Section 1(1): *“If proceedings have been or are to be instituted before the Court, the Court may order, at any time before it makes a final judgment in the proceedings or before the proceedings are otherwise concluded, on the application of any person who is, or as the case may be will be, a party to the proceedings (such person being referred to in this Part of the Law as “the Applicant”), grant an injunction addressed to another person (such person being referred to in this Part of the Law as “the Respondent”) requiring the Respondent to do or not to do any thing”.*
 - (2) Section 1(7): *“An injunction may **in exceptional circumstances** be granted notwithstanding that proceedings have not been and are not to be instituted before the Court”* (emphasis added).
 - (3) Section 4: *“The Court shall not exercise any power conferred by section 1, 2 or 3 of this Law unless satisfied that **it is just and convenient to do so**”* (emphasis added).
75. In England:-
- (1) Section 37(1) of the Supreme Court Act 1981 empowers the Court to *“grant an injunction ... in all cases in which **it appears just and convenient to do so**”* (emphasis added).
 - (2) Section 25 of the Civil Jurisdiction and Judgments Act 1982 (now of general application) empowers the Court to grant all forms of interim relief in aid of foreign

courts. Section 25(2), however provides that “*the court may refuse to grant that relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject matter of the proceedings in question makes it inexpedient for the court to grant it*” (emphasis added).

76. Lieutenant Bailiff Carey held at paragraph 36 of his 29th August 2008 decision, that he was of the view that neither section 1(7) nor section 4 of the LRMPG Law “*were otherwise intended to give this Court wider powers than those that have developed in England and Wales*”. This question seems not to have been argued previously in Guernsey, but, as I shall explain in more detail hereafter, I doubt whether the powers in Guernsey are, in fact, as wide as those in England and Wales.

The English authorities

77. Both sides have cited extensively in their written arguments from the English cases. The extent to which they are persuasive in Guernsey is affected by the differences between legislation in the two jurisdictions, to which I have drawn attention. In my judgment, however, the English cases are relevant to:-

- (1) the relationship between a foreign court hosting the substantive proceedings and the court considering the grant of freezing relief; and
- (2) the relevance of applications for freezing orders in the country hosting the substantive proceedings.

78. I will mention just 3 of the cases.

Credit Suisse v. Cuoghi

79. In Credit Suisse Fides Trust v. Cuoghi [1998] Q.B. 818, the English Court of Appeal upheld a worldwide freezing order against an English resident Defendant sued in Switzerland for alleged complicity in a fraud. The Swiss Court had no jurisdiction to grant such a freezing order.

80. Millett LJ said the following at page 827:-

*“Where a defendant and his assets are located outside the jurisdiction of the court seised of the substantive proceedings, it is in my opinion most appropriate that protective measures should be granted by those courts best able to make their orders effective. In relation to orders taking direct effect against the assets, this means the courts of the state where the assets are located; and in relation to orders in personam, including orders for disclosure, **this means the courts of the state where the person enjoined resides. I recognise that an ancillary jurisdiction ought to be exercised with caution, and that care should be taken not to make orders which conflict with those of the court seised of the substantive proceedings. But I do not accept that interim relief should be limited to that which would be available in the court trying the substantive dispute; or that by going further we would be seeking to remedy defects in the laws of other countries**”* (emphasis added).

81. Lord Bingham CJ said at pages 831-2 in relation to the jurisdiction exercisable under section 25:-

“It would be unwise to attempt to list all the considerations which might be held to make the grant of relief under section 25 inexpedient or expedient, whether on a municipal or a worldwide basis. But it would obviously weigh heavily, probably conclusively, against the grant of interim relief if such grant would obstruct or

*hamper the management of the case by the court seized of the substantive proceedings ("the primary court"), or give rise to a risk of conflicting, inconsistent or overlapping orders in other courts. **It may weigh against the grant of relief by this court that the primary court could have granted such relief and has not done so, particularly if the primary court has been asked to grant such relief and declined. On the other hand, it may be thought to weigh in favour of granting such relief that a defendant is present in this country and so liable to effective enforcement of an order made in personam,** always provided that by granting such relief this court does not tread on the toes of the primary court or any other court involved in the case. On any application under section 25 this court must recognise that its role is subordinate to and must be supportive of that of the primary court” (emphasis added).”*

Refco v. Eastern Trading Company

82. In Refco v Eastern Trading Co 17th June 1998, the English Court of Appeal expressed the view that Mareva relief could be granted in England, even if the country in which the substantive proceedings were brought (State of Illinois, USA, in that case) had such jurisdiction but exercised it on different principles. No application had been made in Illinois, because it was considered it was bound to fail.
83. The decision turned on the “inexpediency” language in section 25(2), which is absent from Guernsey legislation. Morritt LJ said:

*“It seems to me that in both cases the question must be, if the relief is otherwise appropriate for this court to grant, whether to grant it would be inexpedient within section 25(2). **In this case, the observations of Her Honor Judge Conlon indicate clearly that the grant of interim relief here would not trench at all on the management of the case in Illinois or interfere in any way with the exercise of that court’s primary jurisdiction** ... For my part therefore if I had thought that Mareva relief was justified if the substantive proceedings had been brought in England, I would not have thought it inexpedient to grant the relief sought” (emphasis added).*

Fourie v. Le Roux

84. In Fourie v. Le Roux [2007] 1 W.L.R. 320, a liquidator of 2 South African Companies applied for a freezing order against various respondents alleging they had fraudulently stripped the company’s assets and removed them to England. He indicated to the English Court that he intended to make “*statutory inquiries*” in South Africa, and that “*various claims would be formulated*”.
85. The House of Lords held that the court had jurisdiction to grant freezing orders where no substantive proceedings had been issued in the foreign country concerned, but such relief would not normally be granted unless the case for substantive relief had been formulated.
86. Lord Bingham was at pains to point out the importance of the identification of the underlying substantive proceedings:-

*“2. Mareva (or freezing) injunctions were from the beginning, and continue to be, granted for an important but limited purpose: to prevent a defendant dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not a proprietary remedy. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. **They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign:** see *Gee, Commercial Injunctions*, 5th ed (2004), pp 77-83.*

3. In recognition of the severe effect which such an injunction may have on a defendant, the procedure for seeking and making Mareva injunctions has over the last three decades become closely regulated. I regard that regulation as beneficial and would not wish to weaken it in any way. The procedure incorporates important safeguards for the defendant. **One of those safeguards, by no means the least important, is that the claimant should identify the prospective judgment whose enforcement the defendant is not to be permitted, by dissipating his assets, to frustrate.** The claimant cannot of course guarantee that he will recover judgment, nor what the terms of the judgment will be. **But he must at least point to proceedings already brought, or proceedings about to be brought, so as to show where and on what basis he expects to recover judgment against the defendant**” (emphasis added).

87. Lord Scott said the following:-

“32. In para 38 of his judgment in the Court of Appeal Sir Andrew Morritt V-C referred to the need for there to be an "activation of the jurisdiction [to make the freezing order] whether by the issue of substantive proceedings in England or an undertaking to do so". **I would agree that, without the issue of substantive proceedings or an undertaking to do so, the propriety of the grant of an interlocutory injunction would be difficult to defend. An interlocutory injunction, like any other interim order, is intended to be of temporary duration, dependent on the institution and progress of some proceedings for substantive relief.** But it is not in dispute that in suitable circumstances a freezing order may be, and often is, granted and served on the respondent before substantive proceedings have been instituted. Such an order is not a nullity. It is of immediate effect. If proceedings for substantive relief are not instituted, the freezing order may lapse in accordance with its own terms or, on an application by the respondent, may be discharged. But none of this indicates that the court had no jurisdiction to make the order. No "activation" of the jurisdiction is needed.

33. **Whenever an interlocutory injunction is applied for, the judge, if otherwise minded to make the order, should, as a matter of good practice, pay careful attention to the substantive relief that is, or will be, sought.** The interlocutory injunction in aid of the substantive relief should not place a greater burden on the respondent than is necessary. **The yardstick in section 37(1) of the 1981 Act, "just and convenient", must be applied having regard to the interests not only of the claimant but also of the defendant.** This is particularly so in the case of freezing orders applied for without notice. Assets of the defendant to which the claimant has no proprietary claim whatever are to be frozen so as to constitute a source from which the claimant can hope to satisfy the money judgment that, in the substantive proceedings, he hopes to obtain. The frozen assets are removed for the time being from any beneficial use by their owner, the defendant. This is a draconian remedy and the strict rules relating to full disclosure by the claimant are a recognition of the nature of the remedy and its potential for causing injustice to the defendant.

...

35. In the present case no claim for substantive relief was formulated and shown to Park J, nor for that matter to Judge Norris QC, nor to Deputy Judge Jarvis QC until the afternoon of 30 September 2004. **I find it very difficult to visualise a case where the grant of a freezing order, made without notice, could be said to be properly made in the absence of any formulation of the case for substantive relief that the applicant for the order intended to institute.** It has to be inferred that, at the time of the application to Park J, Mr Fourie's counsel were unclear

whether the substantive proceedings would be proceedings in South Africa or in England and, in either case, unclear what the cause or causes of action would be. But at the least a draft claim form could have been prepared claiming an inquiry as to what Mr Le Roux and Fintrade had done with the assets they had seized under the Germiston order and for the return of those assets or damages for their conversion. It seems to me significant that, when the freezing order was discharged in the morning of 30 September 2004, an adequate claim form was produced by that afternoon”.

The relevant principles to be drawn from the cases

88. The principles applicable to this case, which I draw from these authorities are as follows:-

- (1) The ancillary jurisdiction of the overseas court dealing with an application for freezing relief (the secondary court) ought to be exercised with caution.
- (2) But interim relief need not be limited to that which the court dealing with the substantive proceedings (the primary court) could or would grant.
- (3) It may weigh against the grant of relief by the secondary court, if the primary court could have granted such relief and has not done so, and particularly so if it refused such relief.
- (4) To obtain freezing relief, the applicant must identify both (a) the actual or prospective proceedings in aid of which the application is made, and (b) the prospective judgment whose enforcement the defendant is not to be permitted, by dissipating his assets, to frustrate.

89. It may be also be stated that, once the Court is satisfied that the pre-requisites for the making of an order are fulfilled, the Court should not be timid in granting freezing orders that are needed to protect plaintiffs, whether at home or abroad, from having future judgments rendered valueless by the dissipation of the defendant’s assets.

Appeal from an exercise of discretion

90. Mr Davies argues that we can only interfere with the Lieutenant Bailiff’s discretionary decisions if: “(i) *the decision was based on a misunderstanding of the law or of the evidence before him or a wrong inference of fact [was] drawn from the evidence, or (ii) there has been a change of circumstances after the judge reached his decision which would have justified him in acceding to an application to vary his decision”* (see paragraph 15 of Southwell JA’s judgment in Kaduna Limited v R. Durtnell & Sons Limited Civil appeal 334: 18th December 2003)

91. I accept these principles, and have borne them in mind in reaching the conclusions on each of the issues that I set out below.

First issue: Did section 1(7) apply to the application for freezing relief made by the Government, so that ‘exceptional circumstances’ had to be shown before an injunction could lie?

92. The Government argued that section 1(7) was never engaged because proceedings have been instituted by Garnet before the Court. Thus, it was said, exceptional circumstances did not have to be shown, beyond the requirement for it to be ‘just and expedient’ to grant the injunction.

93. Section 1(1) of the LRMPGL gives some guide as to which kind of proceedings are being referred to in section 1(7), because it says that: “[i]f proceedings have been or are to be

instituted before the Court, the Court may order, at any time before it makes a final judgment in the proceedings or before the proceedings are otherwise concluded ...” grant an injunction. It seems to me that the kind of proceedings contemplated, are proceedings in aid of which an injunction is sought. Section 1(7) cannot have been intended to refer to proceedings of any kind, however unrelated to the injunction that is sought.

94. This is confirmed by section 1(7) itself which provides that “[a]n injunction may in exceptional circumstances be granted notwithstanding that proceedings have not been and are not to be instituted before the Court” (emphasis added). The proceedings contemplated are those substantive proceedings that might be instituted before the Court (as opposed to before another Court) to support the injunction.
95. The question, therefore, is whether the proceedings that Garnet began are sufficiently related to the freezing injunction that the Government sought, to enable it to be said that the injunction is or was sought in aid of those proceedings.
96. Garnet’s claims were brought to force the Bank to comply with its mandate, and allow the funds in the Accounts to be moved at the direction of Garnet. Les Defences of the Bank plead in essence as follows:-
- (1) The Bank considered that compliance with Garnet’s instructions might expose it to the commission of a criminal offence under section 39 of the Criminal Justice (Proceeds of Crime) Bailiwick of Guernsey) Law 1999 as amended (“POCL”).
 - (2) The Bank had grounds for suspecting that Mr Putra had been involved in criminal conduct, and that the monies held in the Account might represent the proceeds of criminal conduct.
 - (3) The FIS has never given its consent to the Bank’s compliance with the Instruction.
97. If the Bank or indeed the Government had applied for a freezing order to support the Bank’s plea that the monies were the proceeds of criminal conduct, and prevent their movement as a result, there would be merit in the Government’s argument. The injunction could be said to have been sought in aid of the proceedings.
98. The actual situation, however, is different. The Government has disclaimed any reliance on any treaty obligation or on any criminal conduct to support its injunction application. The Government has restricted itself to relying on the putative and, later, the existing civil proceedings, in Indonesia. It cannot properly be said that the injunction sought by the Government in these circumstances was in aid of Garnet’s proceedings, when nothing in issue in the proceedings was of more than background relevance to the injunction the Government sought.
99. Accordingly, in my judgment, section 1(7) applied to the application for freezing relief made by the Government, so that ‘exceptional circumstances’ had to be shown before an injunction could lie.

Second issue: If section 1(7) applied, what is meant by ‘exceptional circumstances’?

100. Mr Edwards initially argued in his written submissions that the requirement in section 1(7) for ‘exceptional circumstances’ should be construed in a similar way as the discretion in the English section 25(2) providing that “*the court may refuse to grant that relief if ... the fact that the court has no jurisdiction apart from this section ... **makes it inexpedient***” for the court to grant an injunction. I disagree.

101. It seems to me that the imposition of a requirement for ‘exceptional circumstances’ cannot be equiparated with a discretion to refuse an injunction if it is inexpedient to grant it. In the first place, inexpediency is a wholly different concept from the finding of exceptional circumstances. Secondly, one requirement is positive and the other is negative. Section 1(7) provides a further positive hurdle for an applicant to pass, whereas section 25(2) merely provides a negative discretion not to grant the injunction if a specific matter, namely the absence of substantive jurisdiction, makes it inexpedient to do so.
102. The more difficult question is to define precisely what is required for ‘exceptional circumstances’ to be shown. And I do not think this Court should attempt to do so. It is clear that the requirement makes the position in Guernsey different from the position in England, and that this further hurdle must be satisfied if an injunction in a case such as the present is to be granted. It would be unwise, however, to seek to lay down restricting guidelines as to when such circumstances will exist. Each case will turn on its own facts.
103. I should not leave this issue without mentioning the only case that was cited to us on the point, namely the decision of this Court in Reid et al. v. European Internet Capital Limited Civil Appeal 314 and 316: 5th July 2002. Hodge JA said at paragraph 56 that “*I think that the mischief which section 1(7) is addressing is that the Guernsey court might issue injunctions on matters which do not relate to Guernsey and which may not otherwise come before it*”. I respectfully agree and would hold that, in such a situation, ‘exceptional circumstances’ must be shown. In the Reid case, there were exceptional circumstances, namely the likelihood of the Guernsey court being required to resolve a part of the prospective dispute in respect of which the interim injunction restraining a general meeting was granted. That case was, however, very different from this, however, because there was no freezing order in issue.
104. The requirement for exceptional circumstances seems to me to be saying no more than, in a case where the substantive proceedings in aid of which the injunction is sought are not in Guernsey, there must be some additional exceptional factors which make it appropriate for the injunction to lie. What those factors may precisely be, will, as I have indicated, vary infinitely depending on the situation before the Court.
105. The Lieutenant Bailiff does not seem to have been invited to consider section 1(7) in his 23rd May 2007 judgment, though he did so briefly in paragraph 36 of his 29th August 2008 judgment, in which he decided only that section 1(7) did not give the Guernsey Court wider powers than the English legislation. For the reasons I have given, I agree with this, but would go further and say that, in fact, section 1(7) clearly confines the discretion of the Guernsey Court rather more closely than is the case in England, in cases where the substantive proceedings are not in Guernsey. This is, perhaps, not surprising, since it is likely to be more common for injunctions to be sought in Guernsey than in England, when the substantive proceedings, in aid of which the interim relief is sought, are brought elsewhere. Guernsey, as an offshore financial centre, will wish to be able to grant freezing injunctions in aid of proceedings elsewhere, but section 1(7) requires that the Court exercise appropriate caution before doing so.

Third issue: In relation to each of the two judgments made on (a) 23rd May 2007 and (b) 29th August 2008, was the Lieutenant Bailiff right to find that there was a good arguable case against Mr Putra?

106. I have no doubt that, on the evidence before Lieutenant Bailiff Carey on 23rd May 2007, he was right to find at that stage that there was a good arguable case against Mr Putra, at least so far as the P.T. Goro claim was concerned. The Government was required to undertake to the Court to start proceedings against Mr Putra within 3 months, and a review date was set. This seems to me to have been an appropriate way to deal with a difficult problem facing the Court at that time. The concerns and suspicions of the Lieutenant Bailiff that I have alluded to

above could not be fully developed at that stage. It would have been wrong to hold that all of the claims so forcefully argued in Mr Sabda's 3 affidavits were hopeless. It would have been inappropriate to make fine judgments about the validity of an Indonesian Law case at that point.

107. The position had much changed by the time of the hearing in July 2008. At that time, the Government had lost its chosen best case (the P.T. Goro claim), and had then settled the appeal in return for no money whatever. It had initiated two more claims in the manner described above – namely the TPN claim and the Supersemar claim.
108. The Government had failed, by July 2008, to force Mr Putra before the Court as an heir to Mr Soeharto, and I agree with Lieutenant Bailiff Carey's effective finding in paragraph 34 of his 29th August 2008 judgment, that the Supersemar claim, by itself, would not have been sufficient to constitute the good arguable case at that stage.
109. As far as the TPN claim is concerned, I also agree that a good arguable case could be said to have been made out on 29th August 2008. It is difficult for a foreign court to evaluate the likelihood of success of an Indonesian claim at the best of times. It is particularly difficult for this Court to hold there is no arguable case when the Government's appointed representatives are saying it will succeed. But the Government's confidence of success at this stage needs to be tempered by the cautions I have expressed above.
110. Moreover, it seems to me that the Lieutenant Bailiff was right to think that the fact that the claim had not been intimated when the injunction was first applied for need not be fatal to the Government's case, particularly when Mr Sabda's evidence in April 2007 was that there were many claims that were being investigated.
111. Despite the finding of an arguable case, the Lieutenant Bailiff obviously harboured serious doubts about the way in which the Government was running its case against Mr Putra, because he imposed a drop dead date at which the injunction would terminate, namely the 23rd May 2009. I will deal below with whether this was, in itself, an appropriate approach. But it seems to me that it demonstrates that he felt there were at this stage factors present that made it impossible for the injunction to continue for long without detailed supervision.
112. In my judgment, despite the correct finding that there was a good arguable case in a new claim that had not previously been seriously intimated, there were indeed very troubling aspects of the way in which the claims were being handled:-
 - (1) The Government's first chosen claim had been ignominiously lost.
 - (2) The alleged massive claims for corruption had never materialised.
 - (3) The Government had failed to show that it was in a position to pursue such massive claims expeditiously and successfully, probably for some of the reasons I have adumbrated above.
113. These matters, it seems to me, whilst not strictly relevant to the question of whether there was, in August 2008, an arguable case against Mr Putra, were more than relevant to the twin issues of whether it was any longer just and convenient to continue the injunction, and whether there were exceptional circumstances in favour of so doing.

Fourth issue: In relation to each of the two judgments made on (a) 23rd May 2007 and (b) 29th August 2008, was the Lieutenant Bailiff right to find that there was a risk that Garnet might dissipate its assets?

114. Garnet intends to remove the money in the Accounts to Singapore. Despite the issue being raised, neither it nor Mr Putra has been willing to say what will become of it in Singapore. In May 2007, Garnet argued that there could be no risk of dissipation because the FIS had not given consent to the removal of the monies. In my judgment, Lieutenant Bailiff Carey correctly rejected this argument. The FIS could change its mind at any time. Though it might be unlikely to do so, the Bank could disregard the absence of consent. The point of the injunction is to make sure that the monies remain in Guernsey whatever the FIS decides to do in relation to the quite separate proceeds of crime issue.
115. Garnet argues before us that the Court should have asked whether there was a risk of the FIS changing its mind, rather than a risk of dissipation if the FIS changed its mind. I do not agree. The risk of dissipation concerned is the risk of the respondent to the application dissipating the money, not the risk of third parties taking, or not taking, steps to prevent the monies leaving the jurisdiction.
116. Garnet did not argue before the Lieutenant Bailiff in July 2008 that there was no risk of dissipation, and he did not deal with the matter in his 29th August 2008 judgment anew. Mr Edwards has, however, raised the matter again before us, on the basis that, since no freezing orders have been obtained in Indonesia on the grounds that there was no risk of dissipation there, the same applies here. This seems to me to be an irrelevant point. The fact that Mr Putra is not likely to dissipate his wealth in Indonesia cannot conclusively determine whether he may dissipate his overseas assets.
117. It is true that the Government's affidavit acknowledgement that there was no present risk that Mr Putra would dissipate his Indonesian assets is a telling indication that it is not so easy for the Government to persuade an Indonesian Court that Mr Putra is motivated towards allowing future judgments against him to go unsatisfied. This is a point to which I shall return.
118. But if the pure question of dissipation were to be decided, I would agree that the risk of dissipation that the Lieutenant Bailiff found in 2007 persisted in 2008. The fact remains that, despite being given every opportunity to do so, Garnet has not identified the purpose of the transfer to Singapore. There is nothing in the point made under this head that Garnet and Mr Putra are not the same. Mr Putra controls Garnet. If anything, the risk is greater that a creature company would dissipate its assets.

Fifth issue: In relation to each of the two judgments made on (a) 23rd May 2007 and (b) 29th August 2008, was the Lieutenant Bailiff right to find that it was just and convenient to extend the injunction?

119. I can deal quickly with the question of whether it was 'just and convenient' to grant the injunction in May 2007. In my judgment, it clearly was. The requirements of both arguable case and risk of dissipation were made out, and the situation was fluid and uncertain.
120. Balancing competing factors, I cannot fault the Lieutenant Bailiff's decision. He had concerns about the Government's ability to bring proceedings successfully against Mr Putra, and about Guernsey being the leading edge to the Government's actions, but in the end he found that, with the undertakings he extracted from the Government, the injunction should be granted and regularly reviewed.
121. In my judgment, however, the situation was quite different in July and August 2008. By then, as I have already said, the worries that Lieutenant Bailiff Carey had in May 2007 had been demonstrated to be fully justified. They seem to me to be even more justified today.

122. The 'just and convenient' rubric allows the Court, as the cases I have cited show, to exercise a wide discretion. This was a discretion that the Lieutenant Bailiff exercised against continuing the injunction indefinitely. As I shall say in answer to issue 7 below, he was mistaken in thinking in this case that it was appropriate to continue the injunction to an end date some months ahead. I will not say that such a course could never be appropriate. But here, if it was possible to say that the injunction should not be continued until a further review, it should in my judgment have been terminated at once.
123. There are a number of reasons why it was clear that, on 29th August 2008, it was no longer just and convenient to impose an injunction, despite there being both a risk of dissipation and an arguable case on the TPN claim. These reasons are not a new exercise of discretion by this Court, but an approval and slight extension of the concerns expressed in both judgments by Lieutenant Bailiff Carey:-
- (1) The Government's first claim, which it had claimed to be a good one, was lost, and settled for no recovery. This demonstrated that the Government's judgment as to its likely future success in claims against Mr Putra, was, at best, suspect.
 - (2) Despite many years of opportunity before Mr Soeharto's death, and some 7 months after his death (which is perhaps more important), claims against Mr Putra for serious corruption had never materialised.
 - (3) No proceedings were brought against Mr Putra at all before the Guernsey Court required an undertaking that they be initiated.
 - (4) The Government did not freeze Mr Putra's Indonesian assets, suggesting that the Indonesian Courts did not regard Mr Putra in the same way as the Government did. On the Government's own admission, there was no risk of dissipation sufficient to found an Indonesian injunction.
 - (5) The Government has, as yet, failed to bring any claims in any other overseas jurisdiction to trace or freeze the supposedly huge assets of either Mr Soeharto or Mr Putra, thus reinforcing the unexplained focus on Guernsey and the (relatively modest) sums in the Accounts.
124. The conclusion to these points is that the Government's resolve to pursue Mr Putra for the proceeds of massive corruption is seriously questionable. This may be for political or other reasons. The Government has chosen not frankly to explain to this Court why things have been handled as they have, and why it appears that its only concern is this fund in Guernsey, when allegedly there are massive assets elsewhere – some US\$15 billion which previously belonged to Mr Soeharto (and to which Mr Putra is an heir in an unspecified proportion), and some US\$800 million belonging to Mr Putra in his own right. It is simply impossible on this evidence to conclude that, even if the Guernsey monies were to be dissipated, any judgment in the TPN matter eventually obtained against Mr Putra would go unsatisfied.
125. Neither the Royal Court nor this Court could, in these circumstances, have had the necessary confidence that, by August 2008, it remained just and convenient to continue the injunction. A party seeking an injunction, even *inter partes*, must be frank with the Court and explain the reasons why the injunction is required. Despite the lengthy affidavit evidence from Mr Sabda, I have been left with serious doubts as to whether the Government has laid before us a complete account of the problems it faces and of its objectives. These doubts were reinforced in argument before us, when I put the points I have made above to Mr Davies, and he frankly said that he was in no position to tell the Court any more.

126. In my judgment, therefore Lieutenant Bailiff Carey was right, on 29th August 2008, to hold that the injunction could not continue indefinitely. He should, however, have held, as I explain below, that the end point had already arrived.
127. I pause to note that Garnet relied also on the fact that Mr Putra was openly resident in Indonesia, and had not sought to hide his assets. These points reinforce what I have already said. This is an Indonesian case through and through. Mr Putra has properly contested the claims in Indonesia (with the possible (irrelevant) exception of the Supersemar claim). His ready availability and substantial assets in Indonesia make it even less just and even less convenient for an injunction to be continued in the circumstances I have described above.

Sixth issue: If the point had been argued, would there have been exceptional circumstances on 23rd May 2007? Was the Lieutenant Bailiff right to find on 29th August 2008 that, if section 1(7) applied, exceptional circumstances had been shown?

128. As I have held above, exceptional circumstances were required on 23rd May 2007. In my judgment, though the point was not argued below, such circumstances existed at that time for all the reasons that Lieutenant Bailiff Carey gave, and that I have adumbrated above under the heading of ‘just and convenient’. In May 2007, the case was exceptional indeed, and the Government was entitled to say that it had claims it wanted to bring, investigations it wanted to make, and that Mr Putra should be restrained *pro tem* from dealing with the Accounts to give it an opportunity to pursue its claims with all proper expedition.
129. Once again, however, the situation was different in August 2008. By then, the Government had had its opportunity, and it had demonstrated that it was using Guernsey as the focal point of its investigations. This falsified the need for the injunction *in aid* of any proceedings in Indonesia. It seemed rather the other way round. The cart was firmly placed before the horse. For that reason, and all those set out under the just and convenient head above, I would hold that exceptional circumstances could no longer be shown.
130. It will be observed that, in the result, it does not matter whether I am right or wrong on the first issue, as to whether section 1(7) was actually engaged in this case. Even if it were not, the injunction ought to have been terminated on 29th August 2008, because it was then no longer ‘just and convenient’ for it to be continued.

Seventh issue: Was the Lieutenant Bailiff right on 29th August 2008 to extend the injunction to a fixed date of 23rd May 2009, when it would lapse?

131. In my judgment, this is the only real area in which the Lieutenant Bailiff went astray. Indeed one gets the feeling from paragraph 37 of his 29th August 2008 judgment that he realised as much. He said there: “*Although it may appear arbitrary to do so, I consider that this injunction that was originally granted in early 2007, must have an end date by which there should be an order of the Indonesian Court of this court, establishing that the monies ... are indeed lawfully to be paid over to the [Government] ...*”.
132. I have no doubt that both the principle of setting a future end date and the arbitrary selection of it were wrong in principle. I do not say that there will never be circumstances where a future end date for an injunction can be set. Indeed, I can think of many situations in which such an order would be appropriate when known events are known to be going to occur at set times in the future. But that is not this case. The Lieutenant Bailiff had no idea what the situation would be in May 2009, and admitted as much when he described the appearance of what he was doing as “*arbitrary*”. Had he thought that an injunction was still justified, but needed to be regularly reviewed, the proper order was to continue it only until a set review date, as he had done before. In fact, however, my suspicion is that he did what he did, because he understood that the injunction had to end, since it was no longer fully justified. It

seems that the learned Lieutenant Bailiff may have slightly lacked the courage of his convictions by failing to end the injunction at once.

133. In my judgment, the Lieutenant Bailiff was wrong on the 29th August 2008 to extend the injunction to a fixed date of 23rd May 2009. He should have discharged the injunction with immediate effect.

Eighth issue: Was the Lieutenant Bailiff right to continue the stay on the disclosure order on 29th August 2008, pending appeal?

134. Mr Davies submitted that this issue would be academic if we discharged the injunction. Despite being pressed in argument by the Bailiff to accept the suggestion that this application might, in truth be all about the discovery order sought, Mr Davies refused to accept that proposition. I venture to suggest that Mr Davies was pressed with this explanation for the Government's conduct as another possible explanation for what may have seemed, not only to me, as otherwise inexplicable.
135. This issue does not, however, of itself resolve the question of whether the discovery was correctly ordered in the first place. That question was not argued before us, because, as we understand the Government's position, it accepts that if the injunction is discharged, the disclosure order will go with it – presumably because (as the Government says in its own notice of appeal) the disclosure was ordered in aid of the injunction. We will hear counsel further on this point if they wish to make any different submission in the light of this judgment.

Conclusions

136. For the reasons I have given, I would affirm Lieutenant Bailiff Carey's decision as to the continuation of the freezing order on 23rd May 2007, and allow the appeal in part against his order of 29th August 2008. He ought, in my judgment to have discharged the injunction with immediate effect on that date.
137. I would not want to leave this judgment without reiterating what may seem obvious. This is a most unusual case. It should not be taken as a precedent for the refusal of freezing injunctions in normal cases where there is both a good arguable case and a risk of dissipation of the assets in question. The Guernsey Court will wish to provide support to friendly nations and to grant freezing orders in support of foreign proceedings wherever it is proper to do so. But those applying for such orders must make full and open disclosure of the problems they face. In this case, they have failed to do so, and, I venture to say, that that failure (which the Lieutenant Bailiff observed as long ago as 23rd May 2007) has become increasingly obvious as these proceedings have progressed.
138. In these circumstances, I would discharge both the injunction and the disclosure orders against Garnet.

Montgomery JA: I agree.

The Bailiff: I agree also.

Perfecting rulings on costs and ancillary matters made on 9th January 2009
(Perfecting text issued 21 January 2009)

Ruling on costs

VOS, JA:

139. On the question of costs, Mr. Edwards, acting for Garnet, has asked for the costs here and below on an indemnity basis. In my judgment there is no basis for indemnity costs in this

case. Certainly this has been a difficult case. But it has not been suggested in the judgment which I have delivered that the Government has behaved improperly or in any way which would normally be visited by an order for indemnity costs.

140. Mr. Davies, for the Government, has argued that there should be a complex costs order reflecting the fact that parts of the appeal went his way, and that the decision of the Lieutenant Bailiff of May 2007 was upheld, notwithstanding that the injunction is now being discharged. In my judgment, however, that approach would not be justifiable. When one comes to the Court to apply for an injunction, one has to succeed in establishing every ingredient required before an injunction can be made. It is no good coming for an injunction and saying “*I can establish factors A and B but not factor C*”. You are not justified in coming to Court at all, if you cannot establish all the required matters, including factor C.
141. In this case the Government came for an injunction on the basis that it had a sustainable claim against Mr Putra in Indonesia. The claim that it argued was sustainable eventually failed – and failed badly. Accordingly, although the Lieutenant Bailiff was entirely justified in making his order in May 2007, and his order has been upheld, that does not mean that the Government is entitled to the costs of it. The Government got an order on a basis which turned out not to be a satisfactory basis. If the action (that is the P.T. Goro action) had been brought in Guernsey, and if it had failed in Guernsey, the costs of the application for an injunction made in that claim would have followed the failure of the action. The situation is no different simply because the underlying claim was brought in Indonesia. In my judgment, therefore, none of the submissions that Mr. Davies has made justify either a complex order as to costs, or a partial order as to costs. The Government must pay the costs of all the hearings of the applications for the injunction below, and the costs of this appeal on a standard basis to be taxed if not agreed.

ROWLAND, JA: I agree.

MONTGOMERY, JA: I agree.

Ruling on the application for leave to appeal to the Judicial Committee of the Privy Council

VOS, JA:

142. Mr. Davies has applied on behalf of the Government for leave to take his case to the Judicial Committee of the Privy Council. He has argued first that he is entitled to leave as of right under section 16 of the Court of Appeal (Guernsey) Law 1961 on the grounds that the value of the matter in dispute exceeds £500. In my judgment he is not entitled to leave as of right, because this is an interlocutory matter in which there was no sum in dispute. These applications were for an injunction. They were not applications in which any money claim was in dispute. We have been shown no authority supporting the proposition that the fact that an injunction would, had it been granted, freeze a large sum, means that a large sum is in dispute in the injunction application for the purposes of Section 16. In these circumstances, the application for leave to appeal as of right must be dismissed.
143. As an alternative, Mr Edwards asks us to exercise our discretion to grant the Government leave to appeal to the Privy Council, on the ground that the case is of public importance and raises complex and novel issues. It is my clear view that there is no issue of law of public importance raised by this case, and that there is no point of particular complexity or novelty warranting an appeal to the Privy Council, normal principles have been applied. The only possible new question of law that the decision raised was as to the proper meaning of “*exceptional circumstances*” in section 1(7) of the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987. But the decision did not turn on my holdings in relation to that section. In those circumstances, even if the Government were to overturn our decision on the

meaning of that sub-section, it would not make any difference to the outcome. It would not, therefore, in my judgment be appropriate for leave to be granted on that basis.

The remaining issues that might be aired on appeal are extremely special and unusual issues of fact, which are unlikely to have any particular bearing in future cases. The application for leave to appeal to the Privy Council must be dismissed.

ROWLAND, JA: I agree.

MONTGOMERY, JA: I agree.

Ruling on the Government's application to stay the discharge of the injunction pending an appeal to the Privy Council

VOS, JA:

144. Mr. Davies has chosen to apply for a stay of the discharge of the injunction or re-grant of the injunction pending his application for leave to appeal to the Judicial Committee of the Privy Council. He puts the matter on the basis of the dicta of Mr. Justice Megarry, as he then was, in the case of *Erinford Properties v. Another and Cheshire County Council* [1974] 1 Ch 261 at page 267ff. In essence, the Court in that and other cases has held that a stay or the equivalent should be granted where the appeal, if successful, would be rendered nugatory.

145. That is not the case in this situation for several reasons, most of which are adumbrated in my judgment on the appeal.

146. The first is, of course, that the monies are unlikely to disappear from this jurisdiction, in the absence of consent by the Financial Intelligence Service, which we understand is most unlikely to be forthcoming.

147. Secondly, and perhaps more importantly, the reason why the injunction has been discharged is because of the Government's contradictory attitude to the funds held by Mr. Putra. It has been the Government's case that Mr. Putra is massively wealthy in Indonesia, yet the Government has failed to obtain any freezing of those funds in Indonesia. It is this contradictory approach that has, in large measure, led to the discharge of this injunction. If, therefore, the frozen funds were to disappear from Guernsey, there is simply not enough reason to suppose that any judgment which might in future be obtained by the Government against Mr. Putra in Indonesia would not be satisfied by Mr Putra from his assets in Indonesia. It would, in my judgment, be quite inappropriate at this stage to re-impose an injunction pending appeal when this Court has reached such a decision.

148. Finally, these proceedings having taken a tortuous course over the last two years. In my judgment, the Government was clearly not entitled to the injunctions that it obtained, in the events which have happened, and it should not be given any further order freezing the funds in this jurisdiction pending an application to the Privy Council for leave.

ROWLAND, JA: I agree.

MONTGOMERY, JA: I agree.

20th January 2009