

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2024/0012

BETWEEN:

MBS SOFTWARE SOLUTIONS LIMITED

Appellant

and

[1] MATTHEW PAGET
[2] REID ZULPO

Respondents

and

OSCAR TRUSTEE LIMITED
(As TRUSTEE OF THE CHLOE TRUST)

Claimant

Before:

The Hon. Mde. Paula Gilford	Justice of Appeal [Ag.]
The Hon. Mde. P. Nicola Byer	Justice of Appeal [Ag.]
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal [Ag.]

Appearances:

Mr. Sharif Shivji, KC with him, Mr. Jonathan Addo, Mr. Daniel Kessler, Ms. Victoria Lissack and Mr. Andre McKenzie for the Appellant
Mr. Thomas Munby, KC with him, Mr. Ryan Turner and Ms. Tamara Cameron for the Respondents

2025: June 16;
2026: April 23.

Commercial Appeal – Service out of the jurisdiction – Non-party costs order – Whether the court has jurisdiction to permit service of a non-party costs application out of the jurisdiction – Whether rule 7.14 of the Civil Procedure Rules, 2000 (“CPR 2000”) provides independent basis for service out – Requirement for prior permission to serve claim form out of the jurisdiction – Joinder of non-party – Whether application for non-party costs order constitutes a claim – Ratio decidendi and obiter dicta – Conflicting decisions of the Court of Appeal – When the court may depart from its own decisions – Section 50(1) Supreme Court of Judicature (Consolidation) Act 1925 – Transitional

provisions – Civil Procedure Rules (Revised Edition) 2023 (“CPR 2023”) - CPR 2000 vs CPR 2023 – Whether the court may exercise discretion to apply new rules –Whether interlocutory hearing constitutes a “trial date” under Part 75 of CPR 2023

The appellant, MBS Software Solutions Limited, appealed against the order of Webster J (Ag.) dated 18th April 2024 by which the learned judge set aside an earlier order of Jack J (Ag.) granting permission to serve a non-party costs application (“NPC Application”) out of the jurisdiction on the respondents. The NPC Application arose out of proceedings in which Oscar Trustee Limited had obtained costs orders against MBS which remained unpaid. MBS sought, by the NPC Application, to hold the respondents jointly and severally liable for those costs on the basis that they were the real parties to the litigation.

The learned judge determined that the applicable procedural regime was the Eastern Caribbean Civil Procedure Rules 2000 (“CPR 2000”), being the rules in force at the time the order granting permission to serve out was made. He further held that the Court had no jurisdiction under CPR 2000, in particular rule 7.14, to permit service of the NPC Application out of the jurisdiction in the absence of prior permission to serve the claim form out of the jurisdiction. The judge also concluded that the dicta of the Court of Appeal in *Halliwel Assets Inc v Hornbeam Corporation and Vadim Shulman* was not binding; that the earlier order of Jack J (Ag.) did not grant permission to serve the claim form out of the jurisdiction; and that the Court should not exercise any discretion under the Eastern Caribbean Civil Procedure Rules 2023 (Revised Edition) (“CPR 2023”) so as to create jurisdiction over the respondents.

The appellant appealed the order of Webster J (Ag.), contending, inter alia, that the judge erred in departing from *Halliwel*, in his construction of CPR rule 7.14; in his interpretation of the order of Jack J (Ag.); and in declining to apply or give effect to CPR 2023.

Held: dismissing the appeal and awarding costs to the respondents to be assessed by a judge of the Commercial Court if not agreed within 21 days, that:

1. The Court of Appeal in **Halliwel Assets Inc v Hornbeam Corporation and Vadim Shulman** allowed the appeal on the basis that the judge below failed to consider whether the non-party should first be joined and remitted the matter for determination on the merits; it did not decide anything beyond that. The Court’s statements concerning the procedure for serving a non-party costs application out of the jurisdiction, including its observations on CPR rule 7.14, were not necessary for its decision, were not part of the ratio decidendi and were clearly obiter and therefore not binding on Webster J (Ag.). In identifying the ratio decidendi, the Court applied the established principles that only propositions forming a necessary step in the reasoning are binding.

Youngsam v The Parole Board [2019] EWCA Civ 229 applied; **Finzi v Jamaican Redevelopment Foundation Inc** [2023] UKPC 29 applied; **White v Alder and Anor** [2025] EWCA Civ 392 applied; **Halliwel Assets Inc v Hornbeam Corporation and Vadim Shulman** BVIHCP2015/001 (delivered 12th October 2015, unreported) considered.

2. Rule 7.14 of CPR 2000 is only engaged in proceedings where permission to serve the claim form outside of the jurisdiction had been given and it is not sufficient that the claim form qualifies for service out of the jurisdiction; rather, there must be an actual order for service of the process outside the jurisdiction which is what engages the court's jurisdiction over the non-party outside the jurisdiction. To the extent that **Halliwel** suggested that it was sufficient for the claim form merely to "qualify" for service out, that approach is inconsistent with the later decision in **Convoy Collateral Ltd v Cho Kwai Chee**. In those circumstances, the Court was entitled to prefer the later authority.

Convoy Collateral Ltd v Cho Kwai Chee BVIHCMAP2016/0030 (delivered 30th March 2020, unreported) followed; **Young v Bristol Aeroplane Co Ltd** [1944] KB 718 applied; **Halliwel Assets Inc v Hornbeam Corporation and Vadim Shulman** BVIHCMAP2015/001 (delivered 12th October 2015, unreported) considered.

3. While the court's jurisdiction to make a non-party costs order is founded in statute, namely section 50(1) of the Supreme Court of Judicature (Consolidation) Act 1925, the procedural mechanism for engaging jurisdiction over a non-party outside the jurisdiction is governed strictly by Part 7 of CPR 2000. The court has jurisdiction to serve a non-party costs application out of the jurisdiction provided that the proceedings were initiated by a claim form for which permission has been given to serve the defendant outside the jurisdiction; it is insufficient that the claim form merely qualifies for service out of the jurisdiction. In the absence of such prior permission, the court has no jurisdiction over the non-party and service of the application is invalid.

Section 50(1) of the **Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo. 5. c. 49)** applied; **Rules 7.10 and 7.14** of the **Eastern Caribbean Civil Procedure Rules 2000** applied; **Convoy Collateral Ltd v Cho Kwai Chee** BVIHCMAP2016/0030 (delivered 30th March 2020, unreported) followed.

4. The application before Jack J (Ag.) sought permission to serve the non-party costs application and any other relevant documents out of the jurisdiction. Properly construed, that application was plainly not an application for permission to serve the claim form out of the jurisdiction, and the order made did not grant such permission. The absence of any express reference to the claim form, and the form and context of the order, confirm that no permission to serve the claim form was either sought or granted. Accordingly, the requirement in CPR rule 7.14 for prior permission to serve the claim form was not satisfied.

Rules 7.5 and 7.6 of the **Eastern Caribbean Civil Procedure Rules 2000** applied.

5. The validity of the order granting permission to serve out had to be determined by reference to the rules in force at the time the order was made, namely CPR 2000. The judge was correct to apply the Old Rules in determining the set-aside application. Further, the court could not exercise any discretion, whether under CPR 2023 or otherwise, to alter the applicable procedural regime so as to confer jurisdiction over the respondents. As the learned judge correctly held, "discretion

should not be used to create jurisdiction, especially the court's exorbitant jurisdiction to serve foreigners outside the jurisdiction."

Eastern Caribbean Civil Procedure Rules 2000 applied; Part 75 and rule 75.4 of the **Eastern Caribbean Civil Procedure Rules 2023 (Revised Edition)** considered.

JUDGMENT

- [1] **BAPTISTE JA [AG.]:** MBS Software Solutions Limited ("MBS") has appealed the order of Webster J (Ag.) dated 18th April 2024 setting aside an earlier order of Jack J (Ag.) dated 1st November 2022 granting permission to serve an application ("the NPC Application") for a non-party costs order ("NPCO") and any other relevant documents, on Matthew Paget and Reid Zulpo ("the Respondents") outside of the jurisdiction. Webster J (Ag.) ordered that: (1) the order of Jack J (Ag.) be set aside; and (2) service of the NPC Application be set aside.
- [2] The underlying claim was brought by Oscar Trustees Limited ("OTL") against MBS for payment of a debt or damages for breach of contract. Mr. Paget is the sole director and shareholder of OTL. Several costs orders were made against OTL in favour of MBS which remained unpaid. The NPC Application sought to hold the respondents jointly and severally liable for OTL's costs.
- [3] Webster J (Ag.) made the orders on the following bases:
- (1) Whether to set aside the order granting permission to serve the NPC Application out of the jurisdiction depended on the interpretation of the **Eastern Caribbean Civil Procedure Rules 2000**, ("CPR 2000" or the "Old Rules") the rules in force at the time permission was granted, rather than the **Eastern Caribbean Civil Procedure Rules 2023** (Revised Edition) ("CPR 2023" or the "New Rules").
 - (2) The Court did not have power under rule 7.14 of the CPR 2000 to grant permission to serve the NPC Application out of the

jurisdiction; and this was so even if the Claim Form might somehow 'qualify' for the grant of permission to serve out. Rule 7.14 was only engaged where there had been an initial grant of permission to serve the Claim Form out of the jurisdiction.

(3) The dicta of the Court of Appeal in **Halliwell Assets Inc v Hornbeam Corporation and Vadim Shulman**¹ that an NPC application could be served outside the jurisdiction if the Claim Form "qualifies for service" was not binding on him because it was inconsistent with the decision of the Court of Appeal in **Convoy Collateral Ltd v Cho Kwai Chee**.²

(4) The order of Jack J (Ag.) did not, in fact, grant permission to serve the claim form out of the jurisdiction; it only granted permission to serve the NPC Application out of the jurisdiction, as the claim had been stayed.

(5) The court should not exercise any discretionary power it might have to list a case management conference so as to cause CPR 2023 to apply to the proceedings, which would effectively be, to use that discretion to create jurisdiction over persons which the court would not otherwise have.

[4] At the hearing of the application, Webster J (Ag.) identified four issues arising for consideration: (1) whether CPR 2000 or CPR 2023 apply to the Set-aside Application; (2) the jurisdiction of the court to hear and determine the NPC Application; (3) whether Part 7 of CPR 2000 and in particular, rule 7.14, allows service out of the jurisdiction of the NPC Application at all, and if so, on the facts of this case; and (4) whether the court has jurisdiction over the Respondents.

[5] Webster J (Ag.) found at paragraph 38 of the Judgment³ that the NPC Application could not be properly served outside the jurisdiction on the Respondents because there was no prior permission to serve the Claim Form

¹ BVIHCMAP2015/001 (delivered 12th October 2015, unreported).

² BVIHCMAP2016/0030 (delivered 30th March 2020, unreported).

³ BVIHCM2021/0022 (delivered 18th April 2024, unreported) (Hearing bundle p. 284).

outside the jurisdiction. There was no intention or necessity to serve the Claim Form outside the jurisdiction because MBS was resident in the British Virgin Islands (“BVI”). The claim has now been stayed indefinitely and cannot, as a matter of law, be served within or outside the jurisdiction. The decision in **Halliwell** does not assist MBS.

- [6] At paragraph 45 of the Judgment, Webster J (Ag.) found that the court has jurisdiction under section 50 (1) of the **Supreme Court of Judicature (Consolidation) Act 1925**⁴ and rules 7.10 and 7.14 of CPR 2000 to serve a non-party costs (“NPC”) application outside the jurisdiction on a person who is not a party to the proceedings, provided that the proceedings were initiated by a Claim Form for which permission has been given to serve the defendant outside the jurisdiction; it is not sufficient and rule 7.14 is not engaged if the original process “qualifies for service out of the jurisdiction”; there must be an actual order for service of the process outside the jurisdiction which is what engages the court’s jurisdiction over the non-party outside the jurisdiction. He then opined that the decision of the Court of Appeal in **Halliwell** was not binding on this court and the court will follow the interpretation of rule 7.14 in the Court of Appeal’s decision in **Convoy Collateral**.
- [7] Webster J (Ag.) found at paragraph 50 that the order giving permission to serve the NPC Application and “the Documents” outside the jurisdiction did not fulfill the requirement in rule 7.14 of being proceedings in which permission has been given to serve the claim form outside the jurisdiction.
- [8] Webster J (Ag.) declared that valid service of the proceedings upon the Respondents had not been effected and the court did not have jurisdiction over them.

⁴ 15 & 16 Geo. 5. c. 49.

Grounds of Appeal

Ground 1

- [9] Four grounds of appeal have been advanced by MBS against the order of Webster J (Ag.). Ground 1: Webster J (Ag.) was wrong to depart from **Halliwel**. The relevant passages in **Halliwel** permitting service of an NPC application outside of the jurisdiction when a claim form qualifies for service was correctly decided and was not obiter.

Appellant's Submissions on Ground 1

- [10] MBS asserts that Ground 1 concerns whether Webster J (Ag.) was correct not to follow **Halliwel**, which found that the court has jurisdiction to permit service of an NPC application out of the jurisdiction under CPR 2000, where the claim form qualifies for being served outside the jurisdiction. MBS identified two sub-issues:

- (1) whether the relevant passage in **Halliwel** was per incuriam, particularly in light of the Court's reasoning in **Convoy Collateral**. The Court should follow its own decisions unless it considers them to be per incuriam;
- (2) whether the passage in **Halliwel** was obiter or part of the ratio of the decision. MBS contends that this issue is less significant. **Halliwel** was correctly decided and Webster J (Ag.) had no reason not to follow it even if he was not strictly bound to do so as a matter of the law of precedent.

- [11] MBS also posits that **Halliwel** is authority for the proposition that an application for a NPCO can be served out of the jurisdiction under CPR 2000. The sequence of events is that (i) first, the applicant must apply to add the non-party to the claim; (ii) secondly, the applicant must obtain permission to serve the respondent out of the jurisdiction; and (iii) thirdly, the applicant must effect service of the application. MBS posits that Webster J (Ag.) did not make the order because he was not satisfied about the joinder, permission to serve out or the fact of service. Instead, he held that he was free to depart from **Halliwel** based on his construction of **Convoy**.

- [12] MBS argues that Webster J (Ag.) was wrong to conclude that the Court of Appeal's reasoning in **Halliwell** about the procedure for non-party costs application was obiter. The decision taken in **Halliwell** was to remit the joinder application and the application for permission to serve out to the first instance court. The first instance judge had held that he had no power to serve out the NPC application. The Court of Appeal ruled that he did have that power. This is the ratio of the case. If the Court of Appeal had concluded that the first instance judge was right about service out, then it would not have remitted the case. The underlying applications would be bound to fail. The application for service out would have been bound to fail because there would be no power to order service out; and the application for joinder would have been bound to fail because the prospective defendant could never be served with the claim.
- [13] MBS contends that the judge did not make the order because he was not satisfied about the joinder, permission to serve out, or the fact of service. Instead, he held that he was free to depart from **Halliwell** based on his construction of **Convoy**. MBS submits that **Halliwell** was not per incuriam and the judge was wrong to conclude that **Halliwell** was per incuriam or inconsistent with **Convoy**. The two cases can be reconciled or if necessary distinguished. The first instance judge in **Halliwell** had refused permission to serve outside the jurisdiction on two grounds: Firstly, he held that a claim for costs could not fall into CPR 7.3 (10) which permits service out where "[a] a claim is made under an enactment which confers jurisdiction on the court and the proceedings are not covered by any of the other grounds referred to" in the rule. This was because the judge held that the power to make an NPCO was inherent and not statutory. Secondly, an application for an NPCO was not a "claim" and so could not be served out using rule 7.3. This procedure referred to claims, not applications.
- [14] MBS contends that both limbs were rejected by the Court of Appeal: Firstly, the Court of Appeal found that the jurisdiction to make a NPCO was statutory and therefore could potentially fall into rule 7.3 (10). The Court held "Without deciding the point, it would seem to me to be arguable that CPR Part

7.3 (10) would afford an appropriate gateway for service out once the claim form could so qualify as discussed later in this judgment and the criteria for ordering service out were satisfied”⁵.

Secondly, rule 7.13 contemplates that the gateways apply only to claims commenced by claim form.⁶ However the judge failed to consider rule 7.14 which states “an application, order or notice issued, made or given in any proceedings may be served out of the jurisdiction without the court’s permission if it is served in proceedings in which permission has been given to serve the claim form out of the jurisdiction.” This rule appears wide enough to encompass an application for a NPCO but that does not mean service out of the jurisdiction of an application for an NPCO is permissible under rule 7.14 without more. There also needs to be joinder to the proceedings. If the application for joinder is successful, then the claim form becomes one which quite arguably qualify for service out of the jurisdiction under the gateways.

[15] The Court of Appeal concluded that “the court has jurisdiction to grant permission to serve the non-party costs application out of the jurisdiction under CPR 7.14 provided that the claim form qualifies for service out of the jurisdiction under one of the gateways contained in CPR 7.3”. The Court remitted the applications for joinder and permission to serve out to the first instance judge for determination on their merits.

[16] MBS submits that **Halliwell** is authority for the proposition that the court’s jurisdiction to make an NPCO is founded in statute, being section 50 of the **Supreme Court of Judicature (Consolidation) Act 1925**, as the judge recognised. However, **Halliwell** went on to explain how an NPC application is made when the intended respondent is outside of the jurisdiction. This conclusion was not per incuriam. The Chief Justice’s conclusion in **Halliwell** as to how an NPC application is made when the intended respondent is outside the jurisdiction, was not per incuriam. Webster J (Ag.) was wrong, MBS submits, to conclude that **Halliwell** was per incuriam or inconsistent with **Convoy**. The two cases can be easily reconciled or if necessary distinguished.

⁵ BVIHMAP2015/001 (delivered 12th October 2015, unreported), paragraph [17].

⁶ Ibid, paragraph [19].

- [17] MBS maintains that **Halliwell** is not obiter and was binding on the judge. It sets out the procedure for non-party costs orders. The non-parties are the real parties and the court's jurisdiction can apply to them. The court has a broad jurisdiction in respect of costs, which is already established by statute. The question is, what is the procedural mechanism? The rules give a route which the Chief Justice has identified. There was no inconsistency with **Convoy**. **Convoy** did not deal with the **Halliwell** question. The majority decision of the Privy Council had nothing to do with rule 7.14. Voss MR dealt with the gateways. Rule 7.14 was not deployed as part of the reason for his actual decision.

Respondents' Submissions on Ground 1

- [18] In **Halliwell**, Bannister J dismissed an application for permission to serve an application for a NPCO out of the jurisdiction. The respondents point out that the Court of Appeal allowed the appeal on the basis only that Bannister J had failed to consider, first, whether the non-party costs respondent should be joined to the proceedings. Accordingly, the Court of Appeal remitted the matter to Bannister J to consider both the application to join Mr. Shulman as a defendant and the actual application for permission to serve out.

- [19] The Respondents argue that despite it being unnecessary to do so, the Court of Appeal went on to make observations about the interpretation of rule 7.14 that suggested that it entailed a grant of power to permit service out of an application notice if the claim form "qualified" for service out:

"[23] ... it is fairly arguable that if the joinder application was successful in the court below (although I express no opinion on its merits) then it is also fairly arguable that the claim form would qualify for service out under the gateways as discussed at paragraph 17 above. Such a scenario would then sufficiently engage CPR 7.14 which is predicated upon permissibility of the claim form being served out of the jurisdiction.

...

[27] ... I hasten to point out however, that this does not mean that service out of the jurisdiction of an application is permissible under CPR 7.14 without more. The prerequisite remains that the claim form in the proceedings in which the application is issued must be one which qualifies for service out under one of the gateways contained in CPR 7.3.

[28] ... if the application to join Mr. Shulman is successful then the claim becomes one which quite arguably would qualify for service out of the jurisdiction under the CPR 7.3 gateways previously mentioned. This would bring the case very much in line with the reasoning of the English Court of Appeal in *Union Bank* with which the House in *Masri* did not disapprove.

...
[30] ... [i]t is implicit in CPR 7.14, that if an application may be served out without permission, where permission was already given to serve out the claim form, it follows that where an application is to be served out of the jurisdiction such service may be effected with the permission of the court. But this alone does not provide a complete solution. The appellants must also be able to show that the claim form is one which qualifies under one or more gateways contained in CPR 7.3. This in turn will depend on their success in the joinder application.

...
[33] ... I would hold that the court has jurisdiction to grant permission to serve non -party costs applications out of the jurisdiction under CPR 7.14 provided that the claim form qualifies for service out of the jurisdiction under one of the gateways contained in CPR 7.3 ...”⁷

[20] The Respondents submit that to the extent that the Court of Appeal’s judgment in **Halliwell** is to be read as suggesting that rule 7.14 is a source of power to grant permission to serve out, it was not part of the ratio, and it was open to the judge and to this Court not to follow it. The ratio decidendi of **Halliwell** is only that Bannister J had erred in not considering, and not considering first, whether to join the respondent as a defendant to the proceedings. The Court of Appeal did not decide anything beyond that. In fact, the court was careful to repeat that it was expressing no view about the merits of the two applications remitted to Bannister J. The Court of Appeal’s observation and the interpretation of rule 7.14 beyond the matters necessary for its decision were merely obiter dicta that were not binding on Webster J (Ag.) and are not binding on this Court.

[21] The plain and obvious reading of rule 7.14 is that an application, order or notice may (and may only) be served out if it comes within the terms of rule 7.14 (because permission to serve the Claim Form on that defendant has already been granted), not that the Court has an unstated power to grant permission). The gateways are expressly concerned with “claims” set down in a “Claim Form.” The proposition that rule 7.14 contains power to permit service of an

⁷ Respondents’ Skeleton Argument for the Hearing of the Appeal filed on 11th June 2025, pp 9-10.

application notice out of the jurisdiction contradicts the whole thrust of the rules and the fundamental principles that underlines them namely, that the court's jurisdiction is established over a party by service on them of an originating document. The important point is that rule 7.14 is not a basis for establishing jurisdiction over a person against whom it has not already been established – and joinder at the same time as and only for the purposes of the application in issue cannot get around that.

Analysis and Conclusion on Ground 1

- [22] It is apparent from Ground 1 that the starting point is to determine the ratio of the decision of the Court of Appeal in **Halliwel**. In **Youngsam v The Parole Board**,⁸ Leggatt LJ stated at paragraph 40:

“The doctrine of precedent, which is a structuring principle of the common law, presupposes that what a court decides extends beyond the particular dispute before it and that, from analysis of a past case, a general proposition can be derived which has the force of law in later cases. Such a proposition is known as the ratio decidendi (or ratio) of the case. Statements made by judges in the course of giving reasons for their decisions which do not form part of the ratio, known as obiter dicta, may be strongly persuasive - particularly where they are the carefully considered observation of eminent judges. But it is generally accepted that the ratio decidendi alone is binding as a precedent: see e.g. Halsbury's Laws of England, vol 11 (2015), para 25. Hence the ability to identify the ratio of a case and to distinguish it from obiter dicta is an indispensable skill for any common lawyer.”

- [23] The jurisprudence is well-established as to the legal principles involved in making a determination as to the ratio of a case. In making that determination, it is important to bear in mind the salutary words of Lord Leggatt in **Finzi v Jamaican Redevelopment Foundation Inc and Ors**⁹ at paragraph 60:

“It is important not to lose sight of the basic tenets of common law reasoning that every judgment must be read in context, by reference to what was in issue in the case, and it is only the ratio of the decision which establishes a precedent and not the obiter dicta. All too often advocates treat the analysis of cases as if it were simply an exercise in looking at the language used by judges, forgetting that it is not particular verbal formulations that make the common law but the principles on which the particular decisions in cases are based.”

⁸ [2019] EWCA Civ 229.

⁹ [2023] UKPC 29.

[24] In **Youngsam**, Leggatt LJ stated at paragraph 48:

“The ratio decidendi is often described by judges and jurists as a reason or rule of law which is “necessary” to the court’s decision. Conversely, obiter dicta are described as statements which are not “necessary” to the decision or which “go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand”: see Halsbury’s Laws of England, vol 11 (2015), para 26.”

At paragraph 51, Lord Leggatt stated:

“It therefore seems to me that, when the ratio decidendi is described as a ruling or reason which is treated as “necessary” for the decision, this cannot mean logically or causally necessary. Rather, such statements must, I think, be understood more broadly as indicating that the ratio is (or is regarded by the judge as being) part of the best or preferred justification for the conclusion reached: it is necessary in the sense that the justification for that conclusion would, if not altogether lacking, then at any rate weaker if a different rule were adopted.”

[25] In **White v Alder and Anor**,¹⁰ Asplin LJ explained at paragraph 18 that the ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him. A subsequent court is not bound by a proposition of law assumed by an earlier court that was not the subject of argument before it or consideration by that court. Further, where there are conflicting decisions of courts of co-ordinate jurisdiction, the latter decision is to be preferred if it is reached after full consideration of the earlier decision.

[26] What is the starting point in looking for the ratio decidendi? In **Youngsam**, Leggatt LJ gave the following guidance at paragraph 58:

“In looking for the ratio decidendi of a case, the starting - point is always the rulings and reasons given in the judgment (s) to justify the court’s decision, read in the light of the facts of the case and the issues that arose. Generally, this is also where the inquiry ends. But where there is scope for argument that a rule or ruling stated in the precedent case was framed too broadly, or that a decision is for some other reason better explained on a different basis which would enable it to be distinguished, the search for the ratio would also involve an evaluation of the strength and persuasiveness of the reasons expressed in the judgment(s) or otherwise advanced or available for the ruling. Such an

¹⁰ [2025] EWCA Civ 392.

evaluation will require consideration of a wider legal context in order to assess whether and to what extent the reasoning and the result reached in the precedent case are consistent with other authorities and legal principles (including subsequent authorities and developments in the law).”

[27] At paragraph 59, Leggatt LJ expressed the view that whether it is permissible for a later court to engage in such an assessment depends on a variety of factors. He then set out a list of non-exhaustive relevant considerations:

- (1) the degree of unanimity or consensus among the judges (assuming there was more than one) who decided the precedent case;
- (2) the clarity or otherwise of the ruling and of supporting reasoning;
- (3) whether or to what extent the point on which the court rules was in dispute and/or the subject of argument;
- (4) whether or how clearly the court evinced an intention to establish a binding rule;
- (5) whether and to what extent prior relevant authorities were considered by the court;
- (6) whether the court would, or sensibly could, have reached the same result if it had not ruled as it did;
- (7) whether the court’s ruling has been applied or approved in later cases;
- (8) whether the ruling or its underlying reasoning has been criticised by commentators or by judges in later cases;
- (9) whether the court considered or contemplated the factual situation that has arisen in the current case; and
- (10) the level in the court hierarchy of the court which decided the precedent case in comparison with the level of the court deciding the current case.

[28] The ratio in **Halliwell** would be binding on this Court unless persuaded that **Halliwell** falls within one of the exceptional categories in which the Court of Appeal is permitted to depart from one of its previous decisions. The Court of Appeal is in principle bound to follow its own decisions and those of courts of coordinate jurisdictions. The only exceptions to this rule are: (1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow; (2) the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords; or now the Supreme Court. (for present purposes, the Privy Council); (3) the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam.¹¹

[29] I now examine **Halliwell**, having regard to the established jurisprudence in determining the ratio of a case. As the Chief Justice's judgment shows, **Halliwell** was an ex parte interlocutory appeal arising from the appellants' application to serve a third party costs order out of the jurisdiction on the named respondent Mr. Shulman. The appellants had obtained substantial costs orders against Hornbeam Corporation ("Hornbeam"). They applied for the costs to be payable by Mr. Shulman, the ultimate beneficial owner of Hornbeam's shares. The appellants applied for Mr. Shulman to be joined as a party to each set of the proceedings giving rise to the costs orders against Hornbeam and for Mr. Schulman to be made jointly liable to Hornbeam for the payment of the costs pursuant to rule 64.10 of CPR 2000. Mr. Shulman resided out of the jurisdiction, therefore they applied for permission to serve the costs application on him in Monaco.

[30] The learned Chief Justice in delivering the decision of the court said at paragraph 3:

"...the learned judge, without addressing the merits as to whether a case was made out for grounding liability for payment of the Costs against Mr Shulman, refused permission to serve out on the basis that CPR 7.3 simply did not provide a gateway for service out of third-party costs applications. Nothing was said about the application for joinder and no

¹¹ Young v Bristol Aeroplanes Company Limited [1944] KB 718 [729].

reference was made to CPR Part 19 which deals with addition and substitution of parties.”

[31] The Chief Justice stated that the learned judge refused permission to serve out on two main grounds. Firstly, a claim for costs was not a claim under an enactment which confers jurisdiction on the court as contemplated under CPR 7.3 (10) which permits service out where “[a] claim is made under an enactment which confers jurisdiction on the court and the proceedings are not covered by any of the other grounds referred to” in the rule. Secondly, the learned judge considered that CPR 7.3 was not appropriate to deal with third party costs applications as it referenced and thus dealt with causes of action (by a claim form) requiring acknowledgement of service and filing and services of defences. He thus considered that third-party costs applications were not “claims” as that word is used in Rule 7.3.

[32] At paragraph 34, the Chief Justice said:

“The gravamen of the appeal was to clarify the court’s costs jurisdiction and the application of the rules in relation to that jurisdiction as it relates to service out. In as much as the learned judge did not address the merits of the applications for the purpose of determining whether a case had been made out for permitting service out ... the appropriate course is to remit the applications to the court below for determination on their merits.”

[33] In considering what is the ratio, I take account of the established principle and the basic tenets of common law reasoning that every judgment must be read in context, by reference to what was in issue in the case, and that it is only the ratio of a decision which establishes a precedent and not obiter dicta. The substantive issues in **Halliwell** were (1) whether Mr. Shulman should be joined as a party to the proceedings; (ii) the service of the costs application on Mr. Shulman outside the jurisdiction without leave; and (iii) the costs application itself. The Court of Appeal expressly found that the learned judge did not address the merits of the application for the purpose of determining whether a case had been made out for the purpose of serving out.

[34] The Court of Appeal allowed the appeal on the basis that the court below had failed to consider first, whether the non-party costs respondent, Mr. Shulman,

should be joined to the proceedings. Accordingly, the Court of Appeal remitted the matter to the court to consider both the application to join Mr. Shulman as a defendant and the application for permission to serve out. This, is the ratio of the case. The Court of Appeal did not decide anything beyond that.

[35] This conclusion is supported by the Chief Justice's recognition of (i) the failure of the learned judge to address the merits of the application for the purpose of determining whether a case had been made out for permitting service out; (ii) the decision to remit the applications to the court below for determination on the merits; and (iii) the Chief Justice expressly stating that she was expressing no views about the merits of the two applications remitted to Bannister J.

[36] The Court of Appeal's pronouncements in **Halliwell** about the procedure for non-party costs applications outside the jurisdiction, while having persuasive efficacy, were not necessary for its decision; were not part of the ratio decidendi and were clearly obiter and therefore not binding on Webster J (Ag.). The procedural guidance given by the Court of Appeal was not expressly or impliedly a necessary step in arriving at the court's decision and was no part of the best or preferred justification for the Court's conclusion.

[37] Another reason given by Webster J (Ag.) why the findings in **Halliwell** are not binding, is that they conflict with the decision of the Court of Appeal in **Convoy Collateral**. In **Convoy Collateral**, the Court of Appeal found that the service of an application in that case outside the jurisdiction without permission is possible under rule 7.14 only in the proceedings in which permission to serve the claim form has been given. It is not sufficient that the claim form qualifies for service.

[38] **Convoy Collateral** was an appeal against the order of Adderley J discharging an ex parte freezing injunction and service outside the jurisdiction. Adderley J found that the BVI Court did not have power to grant an order permitting service outside the jurisdiction of a free-standing injunction in support of foreign proceedings on a person (Dr. Cho) who is not subject to the territorial or personal jurisdiction of the court. Accordingly, he set aside the order permitting service on Dr. Cho and discharged the freezing order against him.

[39] Webster JA (Ag.) delivered the judgment of the Court of Appeal dismissing the appeal and affirming the judge's findings. Webster JA (Ag.) stated that the central issue in the appeal was whether the injunction gateway in CPR 7.3 (2) (b) of CPR 7.3 (2) should be construed to allow the court to permit service on Dr. Cho, a foreign national residing in Hong Kong who has not submitted to the jurisdiction of the Court, of a free standing freezing injunction in the absence of a substantive claim against him in the BVI. Rule 7.3 (2) states "A claim form may be served out of the jurisdiction if a claim is made – (b) for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction."

[40] Webster JA (Ag.) expressed the Court of Appeal's finding at paragraph [39]:

"... The judge did not err in considering rule 7.14. The rule provides that an application in any proceedings may be served out of the jurisdiction without the court's permission if it is served in proceedings in which permission has been given to serve the claim form out of the jurisdiction. The rule does not apply in this case because the court had not given prior permission to serve a claim form in the proceedings. In the absence of the prior permission the application for a freestanding injunction in support of foreign proceedings must obtain permission to serve the application out of the jurisdiction and for all the reasons set out above the court does not have the power to give such permission."

Webster J (Ag.) stated that this finding by the Court of Appeal was left undisturbed by the Privy Council in its judgment delivered in **Convoy Collateral Ltd v Broad Idea International Ltd; Convoy Collateral Ltd v Cho Kwai Chee**.¹²

[41] Webster J (Ag.) cited the dissenting judgment of Sir Geoffrey Voss MR at paragraph 196 (a judgment with which Lord Reed and Lord Hodge agreed) as giving tacit approval to the finding of the Court of Appeal in *Convoy Collateral*. Voss MR said at paragraph 196:

"The whole thrust of the rules is that service out is in respect of claim forms and statements of claim. The application must be supported by an affidavit stating that the claimant has a "claim" with a realistic prospect of success, to which the defendant can serve a defence. Other process, such as an application notice (perhaps including a claim for

¹² [2023] AC 389.

interim relief such as a freezing injunction), may be served out of the jurisdiction “in proceedings in which permission has been given to serve the claim form out of the jurisdiction ...”

Webster J (Ag.) said at paragraph 43 of the Judgment that:

“The Master of the Rolls references to rule 7.14 is without qualification, which suggests that the rule should be interpreted in accordance with its plain meaning - it will only be engaged in proceedings where the court has given permission to serve the claim form out of the jurisdiction.”

[42] I note that in principle, the Court of Appeal is bound by its own earlier decisions. One of the exceptions to the rule is that the court is entitled and bound to decide which of two conflicting decisions of its own it will follow. Further, the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the Privy Council.

[43] MBS submits that Webster J (Ag.) was wrong to conclude that **Halliwel** was per incuriam or inconsistent with the decision of the Court of Appeal in **Convoy Collateral**. The two cases can be easily reconciled or if necessary distinguished. Firstly, **Convoy** is not authority for the proposition that it is impossible to serve an application outside of the jurisdiction without prior permission to serve the claim form. It is authority for the proposition that, on the law as it then stood, in the absence of a claim form, there could not be service out of an application for an interim freezing injunction on a foreign defendant under the relevant gateway, rule 7.3 (2)(b). **Convoy** does not consider the position of an application for a NPCO (where, by definition, there must be a claim form) nor does it cite the only decision of the Court of Appeal on an application for an NPCO, **Halliwel**. The same point can be made about the minority judgment of the Privy Council of Voss MR.

[44] Secondly, rather than being inconsistent, the two cases agree that rule 7.14 alone is not enough to permit service out of either an application for a NPCO or a freestanding injunction. **Halliwel** and **Convoy** are consistent that the whole thrust of the rules is that service out is in respect of claim forms and statements of claim, that's why **Halliwel** requires joinder of the non-party to the proceedings

via CPR Part 19. After joinder there is an underlying claim form to which the respondents are a party. The application is not made in the abstract. An application for a NPCO is an application for the “real party” to the litigation to pay the costs for which they are held responsible.

[45] Thirdly, unlike a free-standing injunction, the premise of an application for a NPCO is that there is already a pending action in the BVI to which the third party is sufficiently connected. Fourthly, the two cases concern different statutory provisions from two different Acts.

[46] Finally, when considering the technical question of how service is to be effected, one must consider the different context of the two types of relief. Ordinarily, the Claim Form needs to be served on a defendant in order that they can oppose the underlying claim. By the time of an application for a NPCO, the underlying claim has already been determined because the Court has already made a determination about costs. The only issue remaining is the role of the third party in the proceedings. Nothing turns on what the original claim was: what matters now is the relationship between the third party and the expenditure in the proceedings.

[47] The respondents contend that even if the broader observations of the Court of Appeal in **Halliwell** formed part of the ratio decidendi it was open to the Judge and now open to the Court of Appeal not to follow them. They are inconsistent with the later judgments of the Court of Appeal and the Privy Council in **Convoy Collateral**. These courts held that the Court’s power to grant permission to serve out were concerned with substantive claims set down in a claim form, with the consequence that an application for a free-standing freezing injunction could not be brought within the scope of Part 7 CPR.

[48] The Respondents point out that it was Webster JA (Ag.) who gave the judgment of the Court of Appeal in **Convoy** and Webster J (Ag.) at paragraphs 42-44 in this case who held that a first instance, court was not bound to follow **Halliwell** as a result of the decision in **Convoy**. He was particularly well-placed to reach that view of his earlier judgment and was right.

[49] The Respondents argue that MBS' analysis of **Convoy**, does not grapple with the fact that one of the questions before the Court of Appeal and Privy Council in **Convoy Collateral** was whether the Court had power to grant permission to serve a document other than a claim form (viz an Notice of Application) out of the jurisdiction; and that as part of the answer to that question, the courts explained the scheme of Part 7 and the operation of rule 7.14 in terms that are inconsistent with **Halliwell** (the applicant having relied on rule 7.14 CPR in support of its case). It is, therefore, part of the ratio decidendi (and, in any event, obiter dicta to be preferred) "that prior permission to serve a claim form in the proceedings" is necessary in order to engage rule 7.14.

[50] Further, even if it were merely obiter or the ratio decidendi of **Halliwell** were broader than is suggested here, the analysis in **Convoy Collateral** is also clearly right and the Court should follow it.

Conclusion

[51] I have taken into account the arguments of both parties. I note MBS' submission that **Halliwell** and the Court of Appeal's decision in **Convoy** can be easily reconciled or if necessary, distinguished. In addressing that issue, it is important, however, to keep in mind that the whole thrust of the rules regarding service out is in respect of claim forms, as recognised by the Chief Justice in **Halliwell**. At paragraph 17:

"... it would seem to me arguable that CPR 7.3 (10) would afford an appropriate gateway for service out, once the claim form could so qualify".

Also, at paragraph 18, when the totality of rule 7.3 is considered in context, the conclusion to which one is ineluctably drawn is that even though the various sub-rules deal with different types of claims which may be served out of the jurisdiction, it is clearly contemplated that those claims are claims which have been commenced by claim form.

[52] This also finds expression in the minority opinion of the Board in **Convoy Collateral Ltd v Broad Idea International Ltd.; Convoy Collateral Ltd v Cho**

Kwai Chee¹³ which was considered by Webster J (Ag.). Webster J (Ag.) stated at paragraph 42 that Sir Geoffrey Voss MR in a dissenting judgment with which Lords Reed and Hodge agreed, gave tacit approval to the finding of the Court of Appeal. (The Court of Appeal had found that the service of an application outside the jurisdiction without permission is possible under rule 7.14 only in proceedings in which permission to serve the claim form had already been given. It was not sufficient that the claim form qualifies for service.) After considering Part 7 dealing with service of a claim form outside the jurisdiction, including rule 7.14, Sir Geoffrey Voss MR said at paragraph 196:

“The whole thrust of these rules is that service out is in respect of claim forms and statements of claim. The application must be supported by an affidavit stating that the claimant has a “claim” with a realistic prospect of success, to which the defendant can serve a defence. Other process, such as an application notice (perhaps including a claim for interim relief such as a freezing injunction) may be served out of the jurisdiction “in proceedings in which permission has been given to serve the claim form out of the jurisdiction ...”

[53] Rule 7.14 provides that:

“An application, order or notice issued, made or given in any proceedings may be served out of the jurisdiction without the court’s permission if it is served in proceedings in which permission has been given to serve the claim form out of the jurisdiction.”

I agree with the observation of Webster J (Ag.) at [43] that: “The Master of the Rolls references to rule 7.14 is without qualification, which suggests that the rule must be interpreted in accordance with its plain meaning - it will only be engaged in proceedings where the court has given permission to serve the claim form out of the jurisdiction”.

[54] In my judgment, as the Court of Appeal’s decision in **Halliwell** on the issue of the interpretation of CPR 7.14 conflicts with its later decision in **Convoy Collateral**, this Court is entitled to decide which of the two conflicting decisions of its own it will follow. For the reasons indicated, this Court affirms Webster J’s (Ag.) finding at paragraph 44 that:

“... this court is not bound to follow the dicta of the Court of Appeal in Halliwell and can come to its own conclusion as to the meaning of rule

¹³ [2023] AC 392.

7.14. That conclusion is that rule 7.14 is only engaged in proceedings where permission to serve the claim form outside the jurisdiction had been given. If permission has been given, an application to serve the application outside the jurisdiction (in this case the NPC Application) would not be necessary. If permission was not given the applicant (MBS) cannot rely on rule 7.14.”

[55] For all the reasons given, Ground 1 of the grounds of appeal is dismissed.

Ground 2

[56] Ground 2: Webster J (Ag.) was wrong to construe the November Order of Jack J (Ag.) as not providing permission to serve the claim form outside the jurisdiction. The November Order permitted service of “all relevant documents” outside the jurisdiction; that included the claim form. Jack J (Ag.) plainly contemplated the court adopting jurisdiction over the Respondents, ultimately because he was satisfied that there was at least a serious case to be answered for them being the “real parties” to the litigation. On the judge’s construction, Jack J’s order was fatally defective.

Appellant’s Submissions on Ground 2

[57] Ground 2 deals with the construction of the order. The appellant contends that Jack J (Ag.)’s November Order permitted service of all “relevant documents” outside the jurisdiction. If there needed to be an actual order for service of the claim form outside of the jurisdiction, then in any event this was the order granted by Jack J (Ag.) in the November Order. This point alone disposes of the appeal: if Jack J (Ag.) gave permission to serve the claim form then there will be no need for the Court of Appeal to determine whether (as a matter of law) permission to serve out the claim form is a necessary part of the NPC application procedure.

[58] The appellant asserts that the question for the Court is, understood objectively, whether when Jack J (Ag.) gave permission to serve the “Documents” outside of the jurisdiction, he intended to give permission to serve the claim form filed by OTL in these proceedings. The appellant submits that it did. Five bases are advanced for that submission including:

- (1) The sole object of the November Order was to facilitate an inter partes hearing of the application for an NPCO. It was for the same reason that Jack J ordered that the Respondents be joined as parties to the claim. This lends itself to a broad interpretation of permission.
- (2) The term “Documents” was defined in the November Order as “any other relevant documents in the Proceedings”. The word “relevant” can only mean ‘all documents which MBS wishes to serve in order to achieve an effective inter partes application hearing’. This includes the claim form. In any event, “relevant documents” included the NPC Application documents which MBS intended to serve which included its supporting evidence and exhibits (which included the claim form).
- (3) It is not material that the November Order does not expressly refer to the Claim Form. The documents of practical importance for the Respondents’ purposes were the Notice of Application and its supporting evidence. The Respondents’ role in these proceedings is only to respond to the application for a NPCO; they have no role in the underlying claim.
- (4) It is circular to say that there was no application for service out of the claim form before the judge. The application was for an order that MBS be permitted to serve the application for a NPCO “and any other relevant documents “outside of the jurisdiction and referred to the gateways at rule 7.3.

[59] For the avoidance of doubt, MBS submits that the judge was also wrong to assume that it would be impossible “as a matter of law” to give permission to serve the claim form outside the jurisdiction given the stay.

Respondents’ Submissions on Ground 2

[60] The Respondents contend that partway through the hearing before Webster J (Ag.) in response to a question from the court, MBS’ counsel presented a new

case entirely absent from the appellant's skeleton argument for the hearing. The suggestion was that Jack J (Ag.) had granted permission to serve the claim form on the Respondents out of the jurisdiction and that in fact it had been served on them. It is this new case that gives rise to Ground 2. The Respondents submit that this new case is hopeless and Webster J (Ag.) was entirely right to reject it:

(1) By paragraph 2(b) of the Application Notice, an order was sought for permission "to serve the Non-Party Costs Order Application and any other relevant documents (the Documents) on Mr. Paget and Mr. Zulpo out of the jurisdiction...". As Webster J observed at paragraph 49, that was plainly not an application for permission to serve the claim form out of the jurisdiction. Had permission to serve the Claim Form been sought, the Application Notice and Draft Order would obviously have said so.

(2) It would make no sense for an applicant to seek permission to serve out both the Claim Form and an Application Notice, given (i) on the premise underlying Ground 1, permission would only be required for the Application Notice, and (ii) on the premise underlying Ground 2, permission would only be required for the Claim Form. It is therefore impossible to construe the Application Notice as a request for permission to serve the Claim Form out.

(3) Consistently with this, in its skeleton argument for the hearing of that application before Jack J (Ag.) the permission being sought was summarised in its single sentence conclusion:

"For the reasons set out above, the court is respectfully invited to direct that MBS has permission to serve the NPC Application on Mr. Paget and Mr. Zulpo out of the jurisdiction."

(4) Nor was there any mention of the Claim Form or a request for permission to serve it out in the oral submissions made by counsel at the ex-parte hearing before Jack J (Ag.). Indeed, the oral submissions made to the court contradict the suggestion that permission was being sought to serve a claim form out of the jurisdiction:

“Moving out to the gateways, we recognise that the language of CPR 7.3(2) deals with claims rather than applications of this nature and there is, it does require some conceptual thought as to how that regime should be applied in this context, and we accept that there is a degree of ambiguity in the language.”

- (5) Clearly therefore, it was the Application Notice and the request for a non-party costs order set out in it and not the Claim Form and any claim set out in it, that permission was being sought to serve out.
- (6) Nor, as Webster J (Ag.) held at paragraph 50 did the Jack J's Order in fact grant permission to serve the Claim Form on Rs out of the jurisdiction. The dispositive order provided that “The Applicant be permitted to serve the documents on the Respondents out of the jurisdiction”. “Documents” was defined in the recitals as “the Non-Party Costs Order Application and any other relevant documents in the Proceedings”, distinguishing between the documents that D (wrongly) conceived were necessary to establish jurisdiction (i.e. “the Non-Party Costs Order Application”) and an opaque class of documents not concerned with establishing jurisdiction (“any other relevant documents in the Proceedings”). That definition does not include the Claim Form:
 - (a) Those are not the terms in which an order granting permission to serve a Claim Form is conventionally cast. An order granting permission to serve a Claim Form out of the jurisdiction ordinarily provides, in clear terms, that a party has permission to serve the Claim Form out; and it is not then necessary for any further grant of permission in respect of any other document because that follows by virtue of rule 7.14 CPR. The starting point must, therefore, be that, if it were the objective intention of the Court to grant permission to serve the Claim Form, the Court would not have expressed itself this way.
 - (b) Even on a literal reading of the definition of “Documents”, it is wrong to suggest that it includes the Claim Form. To

suggest that the Claim Form is an “other relevant document in the Proceedings” begs the question: “relevant” to what? The answer to that question cannot be a document relevant for the purpose of establishing jurisdiction, for the order assumes (wrongly) that jurisdiction would be established by the service of the Application Notice. But the Claim Form is not relevant for any other purpose.

- (c) The Claim Form is so far removed from the definition of “Documents” that at 30(b) of its appeal skeleton D is driven to contend that the definition extends to “all documents which MBS wishes to serve “to achieve its aim. Plainly, it does not.

[61] The appellant’s attempt to characterise the Jack J (Ag.)’s order as a grant of permission to serve the Claim Form is also contradicted by the absence from the order of the provision required by rule 7.5 (2) CPR. This rule requires the order granting permission to “state the periods within which the defendant must – (a) file an acknowledgement of service in accordance with Part 9; and (b) file a defence in accordance with Part 10.” Likewise, rule 7.6 requires the Claim Form for which permission has been granted to “be amended to state the period within which the (a) acknowledgement of service; and (b) defence; must be filed.” The absence of any such provision or amendment is telling as to the Order granted. Moreover, it is plainly right that service out could not be granted of a stayed Claim Form.

[62] In any event, it is beyond doubt that the appellant did not make an application for and was not granted permission to serve an amended Claim Form that named the respondents as a party to the Claim Form (in the light of their joinder) and pursue a claim against them. Ground 2 is entirely off point.

[63] The reasons given in support of its construction of the order at paragraph 30 of its appeal skeleton do not justify the conclusion that the order granted permission to serve the Claim Form on the Respondents out of the jurisdiction.

Additionally, the Respondents take issue with the assertion that the “sole object of the Order ‘was to facilitate’ the hearing of the Application”, and that this “lends itself to a broad interpretation of the permission”. The Respondents state that this is wrong. The purpose of the Application, and the order made on it, was to obtain a grant of permission to serve the Notice of Application out of the jurisdiction: that is how the application before Jack J (Ag.) was put. That is what was being sought.

- [64] Further, the Respondents posit that it is not right to suggest, that the court should construe the order in the light of an objectively correct interpretation of the Rules in an effort to give the Order a different meaning. The suggestion by the appellant that what matters for the purpose of the serving out rules is what is of “practical importance” is simply wrong. The Respondents also assert that if they are right in relation to Ground 1 (I find that they are right) on what a proper construction of the rules required was service of a Claim Form on them (with permission) then the appellant cannot simply downplay it as being a document of little “practical importance”.

Conclusion on Ground 2

- [65] Having considered the submissions of the parties, I prefer the submissions of the Respondents. In my judgment, and in agreement with Webster J (Ag.), I find that paragraph (b) of the Application Notice sought an order for permission to serve the NPC Application and any other relevant documents on Mr. Paget and Mr. Zulpo out of the jurisdiction. That was plainly not and does not constitute an application for permission to serve the Claim Form out of the jurisdiction. The purpose of the application, and the order made on it, was to obtain a grant of permission to serve the Notice of Application out of the jurisdiction: this is how the application before Jack J (Ag.) was put. It was the Application Notice and the request for a non-party costs order set out in it, and not the Claim Form and any claim set out in it, that permission was sought to serve out. In the premises, I would dismiss Ground 2.

Ground 3

Appellant's Submissions on Ground 3

- [66] Ground 3 asserts that the learned judge's construction and approach to the New Rules was wrong in law. The date for the hearing of an interlocutory application was not a "trial date". The judge had a discretion to cause the New Rules to apply and should have exercised it.
- [67] The appellant submits that Webster J (Ag.) concluded for the wrong reason that CPR 2000 applied to the application for an NPCO. In so doing, he adopted the wrong approach to the exercise of his discretion under the New Rules.
- [68] Rule 75.3 of the New Rules provides:
"These rules do not apply to proceedings commenced before the commencement date in which a trial date has been fixed unless the date is adjourned."
- [69] Webster J (Ag.) interpreted "trial date" to include all "actions, matters and other proceedings" as used in rule 75.1 (1), including the NPC Application before him. The hearing of the Respondents' Set Aside Application, which was set before the commencement date, meant the application for a NPCO were proceedings commenced before the commencement date in which a trial date had been fixed (see paragraph 23 of the Judgment).
- [70] The appellant contends that this is an unnatural meaning of the Rules which leads to absurdity. The appellant's position was not that the New Rules applied automatically. It was that the judge had the discretion to cause the New Rules to apply, e.g. by listing a Case Management Conference. It was because the judge had this discretion, and because the New Rules provide for service of an application for an NPCO outside of the jurisdiction without leave, that the judge had the power to deal with the application for a NPCO under the New Rules.
- [71] This is not (as the judge held at paragraph 47) an impermissible exercise of discretion because it requires exercising an exorbitant jurisdiction over foreigners. The "exorbitance" (which in any event is an analysis which the Court

discourages) is embedded within the statutory power to grant non-party costs. The discretion is merely in choosing to apply the New Rules rather than CPR 2000. The whole purpose of rule 75.4 is to recognise that the New Rules are an improvement from a policy perspective and, where appropriate, should be followed even in “old proceedings”.

[72] The procedure for service out is an area where there is a striking difference between CPR 2000 and the New Rules. The Court could and should have used its discretion to follow the approach in the New Rules.

[73] For the avoidance of doubt, the Court has the power to retroactively assume jurisdiction over a party via giving permission to serve a claim form. The judge has not dismissed the application for an NPCO: once the New Rules apply then MBS would not even require further permission to serve out.

Respondents’ Submissions on Ground 3

[74] The applicable rules: the question for the Court on the return date was whether an order granting permission to serve out, made by Jack J (Ag.) on 1st November 2022, long before the New Rules came into force, ought to be set aside. It was common ground that the question fell to be determined as at the date the order was made. The question for Webster J (Ag.) was not whether permission to serve out should now be granted, as though a fresh application for permission to serve out had been made, but whether permission could be granted on the date it was so granted. That question could only be determined according to CPR 2000 in force at that time. This is also what Webster J (Ag.) decided. The appellant’s only objection to Webster J (Ag.)’s conclusion that the Old Rules applied, is that he reached the conclusion for the wrong “reason”.

[75] Webster J (Ag.) determined the applicable rules by focusing on the date on which the order granting permission was made (see paragraphs 21-22 of the Judgment). In particular, the learned judge observed:

“I prefer the submissions of Mr. Mumford KC. The NPC application is the only remaining matter in the proceedings, the claim having been stayed. The orders that are challenged under the Set-Aside Application

were made under the Old Rules. At that time leave to serve a claim form outside the jurisdiction was required and there was no rule allowing a non-party costs application on persons outside the jurisdiction unless permission to serve the claim form outside had already be given. No such permission had been applied for or given in this case. The Respondents challenged the service out order because it did not comply with the provisions of rules under which it was made the former rule (7.14.). If the New Rules apply the Respondents will lose the opportunity to challenge the service out order based on MBS' failure to comply with the procedures in the former rule 7.14."

- [76] The Respondents agree that Webster J (Ag.) went on to make an observation at paragraph 23 about the meaning of the expression "trial date" in Part 75; but that was strictly unnecessary. His decision turned on the date on which the order granting permission to serve out was made and the relevant date for the purpose of an application to set aside that order. He observed at paragraph 23:

"I find that part 75.2 (3) should be given a wide interpretation and the words 'trial date' are not restricted to trial dates for the trial of a claim, but extends to 'actions, matters and other proceedings in existence at the commencement date' (rule 75.1). Where, as in this case, an ex-parte application was determined under the Old Rules; an application to set aside the order was made and a date set for the hearing of the application before Transitional Date; and the New Rules have a significant impact on the issues in the Set-Aside Application, the Old Rules should be applied to determine the Application. I will consider the application under the Old Rules."

The Respondents agree with the appellant that the first sentence of paragraph 23 is an error: the final hearing of the application is not a "trial". That is set out in the Respondent's Notice, but that minor error is immaterial.

- [77] The Respondents dealt with the appellant's assertion that "the Judge had the power to cause the New Rules to apply" and should have used that power. The Respondents contend that whether the judge could have caused the New Rules to apply is irrelevant to the question for the Court at the hearing, viz. whether the grant of permission by Jack J (Ag.) should be discharged, which depends on the construction of the rules applicable on the date Jack J (Ag.) made the Order rather than the rules that applied at the date of the hearing before Webster J (Ag.) or a subsequent date.

[78] In any event, the appellant's submissions that the Court should have taken steps to cause the New Rules to apply is obviously wrong:

- (1) The Rules Committee laid out transitional provisions in Part 75 and in accordance with those provisions it was the Old Rules that applied to this case. In an effort to get around that fact the appellant argued, however, that the Court should convene a Case Management Conference solely for the purpose of causing the case to be subject to the New Rules, and thereby, to deliver to it an advantage in this litigation.
- (2) Webster J (Ag.) considered and rejected that invitation and was plainly right to do so. It would have involved using a discretion said to arise in the proceedings against the Respondents in order to establish jurisdiction against them with respect to the proceedings. The appellant could now only succeed in an appeal against Webster J(Ag.)'s decision by persuading the Appeal Court that Webster J(Ag.)'s exercise of discretion was perverse. The appellant does not even engage with the judge's reasoning on this point at paragraphs 20-22 or explain rather than merely assert – the alleged error in the judge's reasoning. The judge's exercise of discretion was within the wide margin afforded to him and was manifestly right.

[79] The Respondents submit that the request to cause the New Rules to apply must, in any event, fail, given:

- (1) The request was made without an application for such an order;
- (2) The Court could not order a Case Management Conference in proceedings where the Court has not established it has any jurisdiction under the Old Rules and which have otherwise been stayed by order of the Court; and

- (3) There was no reason for the Court to order a Case Management Conference – what was to be decided by the court at the case management conference?

[80] The appellant's submission that the Court can retroactively assume jurisdiction over a party is irrelevant to the question whether the Court should set aside the grant of permission. There was no application before Webster J (Ag.) for a new, retrospective grant of permission under the Old Rules, and had there been, it would have encountered the same obstacles as the order of Jack J (Ag.).

Analysis and Conclusion on Ground 3

[81] I am in sync with the Respondents' submissions on Ground 3. Jack J (Ag.)'s order granting permission to serve out was made on 1st November 2022; CPR 2000 applied at that time. The question before the court on the return date, being whether the order should be set aside, evidently had to be determined under the applicable rule at the time, as Webster J (Ag.) correctly decided. Webster J (Ag.)'s finding at paragraph 23 that the words "trial date" are not restricted to the trial of a claim, but extend to "actions, matters and other proceedings in existence at the commencement date" was criticised by both the appellant and Respondents as erroneous. Critically though, I agree with the Respondents that Webster J(Ag.)'s decision turned on the date on which the order granting permission to serve out was made. This was the legally relevant date.

[82] I agree that the appellant's argument that Webster J (Ag.) had the power to cause the New Rules to apply and ought to have used that power is irrelevant to the question before the court at the hearing, which was whether the grant of permission by Jack J (Ag.) should be discharged. The answer to which depended on the rules applicable at the date the order was made rather than the rules that applied at the date of the hearing before Webster J (Ag.).

[83] In addressing the issue of discretion, Webster J (Ag.) referenced the appellant's point that even if CPR 2000 applies to the proceedings, the court has a discretion under rule 75.4 of CPR 2023 to take into account principles in the

CPR 2023 when considering a matter to which the Old Rules apply. Rule 75.4 states:

“If in proceedings commenced before the commencement date the court has to exercise its discretion, it may take into account the principles set out in these rules and, in particular, Parts 1 and 25.”

[84] Part 1 contains the court’s overriding objective to deal with cases justly. Part 25 deals with the court’s case management objective of actively managing cases. Webster J (Ag.) noted Mr. Shivji KC’s submission that the court should exercise its discretion by applying the new rule 7.17 which allows service of an application, such as the NPC Application outside the jurisdiction without permission if the application is served in proceedings in which court process has been served out of the jurisdiction under rule 7.2.

[85] Webster J (Ag.) stated that:

“The effect of the former rule 7.14 is that it gave the court jurisdiction over a non party in circumstances where the court has found by its order granting leave to serve out that it has jurisdiction over the defendant. The rule effectively extends the court’s jurisdiction to a person who is to be joined as a party to the proceedings. To suggest that that rule should apply to a person over whom the court has no jurisdiction where there has been no prior order to serve the defendants outside the jurisdiction in accordance with the strict requirements of part 7 is extending the discretion contained in rule 75.4 beyond its proper limits. Discretion should not be used to create jurisdiction, especially the court’s exorbitant jurisdiction to serve foreigners outside the jurisdiction. This is not a proper case for applying rule 75.4”.

I agree with Webster J (Ag.).

[86] I also agree that the appeal is not about a case management discretion. It is a case about the construction of the Rules. Webster J (Ag.) cannot be faulted for not listing a case management conference for the purpose of causing the case to be subject to the New Rules. The judge was not exercising a discretion. It was a matter of law. [Part 75.3(3) provides that “If a trial date has not been fixed in proceedings commenced before the commencement date – (a) the court office must fix a date, time and place for a case management conference under Part 27 after a defence has been filed and give all parties at least 28 days’ notice

of the conference; and (b) these rules apply from the date of the case management conference].

[87] For all the reasons given, Ground 3 is dismissed.

Ground 4

Appellant's Submissions on Ground 4

[88] The appellant states that if Ground 3 is unsuccessful and the application for an NPCO was indeed a trial, then on the logic of the judge's own approach, the court erred in its interpretation of rule 75.3(1). The first thing that the judge did on 5th March 2024 was adjourn the hearing of the application for an NPCO in order to spend the day at the hearing considering the Respondents' application to set aside the November Order. Rule 75.3(1) provides that the New Rules "do not apply to proceedings commenced before the commencement date in which a trial date has been fixed unless that date is adjourned." By the judge's own logic, the decision to adjourn the application for an NPCO therefore triggered the New Rules which would then have applied. It follows on the judge's own approach that the court was wrong to declare that the court had no jurisdiction over the Respondents and to order that service "be set aside". The application for a NPCO could and should continue following the New Rules.

Respondents' Submissions and the Court's Conclusion on Ground 4

[89] The Respondents state that Ground 4 does not get off the ground: the hearing of an interlocutory application does not constitute a "trial date", and there was no "adjournment" of that hearing for the purpose of Part 75 of the New Rules. Ground 4 is no longer relevant. Ground 4 should be dismissed. I agree with the Respondents' submissions. I also note that Ground 4 is predicated on the success of Ground 3. The Court has dismissed Ground 3.

[90] Ground 4 is accordingly dismissed.

Respondents' Notice

- [91] The respondents state that if the Court were to determine that there was error in the analysis of Webster J (Ag.) that would vitiate his order setting aside permission to serve out, it would be necessary for the Court to go on to consider whether there was a “qualifying” Claim Form and an available gateway for the Court to grant permission to serve out.

Conclusion on Respondents' Notice

- [92] Although I find no error in Webster J (Ag.)’s analysis which would vitiate his order setting aside permission to serve out, for completion, I will briefly address the Respondents’ notice. I would affirm the Respondents’ Notice for the reasons advanced. Briefly, the only Claim Form in the proceedings is the Claim Form setting out the original claim made by Oscar Trustees against the appellant. It was Oscar Trustee’s Claim Form and contained no claim by the appellant at all. It does not name the respondents and contains no claim against them; and it is clearly not a claim that qualifies for service out of the jurisdiction: there is no claim made in it that would fall within a gateway. The request for costs against the Respondents in the application is not set out in a Claim Form. A request for costs has none of the features of a substantive claim in the sense contemplated by the Rules. The request for costs not being a substantive claim, it cannot come within a jurisdictional gateway.

Order

[93] It is ordered that:

- (1) The appeal is dismissed.
- (2) The Respondents are awarded costs to be assessed by a judge of the Commercial Court if not agreed within 21 days.

I concur.
Paula Gilford
Justice of Appeal [Ag.]

I concur.
P. Nicola Byer
Justice of Appeal [Ag.]

By the Court

Chief Registrar