

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2016/0030

BETWEEN:

CONVOY COLLATERAL LTD

Appellant

and

**[1] BROAD IDEA INTERNATIONAL LIMITED
[2] CHO KWAI CHEE (also known as CHO KWAI CHEE ROY)**

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Paul McGrath, QC with him Mr. Jonathan Addo and Ms. Lucy Hannett
for the Appellant
Mr. David Mumford, QC with him Mr. Fraser Mitchell for the 2nd Respondent

2019: October 18;
2020: March 30.

**The judgment of the court will not
take effect until Wednesday,
1st April, 2020 at 12:00 noon.**

Commercial Appeal – Ex parte freezing injunction - Service outside jurisdiction – Absence of substantive claim against foreign defendant within jurisdiction - Presence of assets within jurisdiction- Jurisdiction to serve freestanding injunctions- Rule 7.3(2)(b) Civil Procedure Rules 2000 - Whether the court had jurisdiction to authorise service of an application for freestanding injunctive relief on a person outside jurisdiction pursuant to Rule 7.3(2) and not otherwise subject to the jurisdiction of the Court -- Whether reasons given by learned judge in court below sufficient - Interpretation of Rule 7.3(2) - Invitation to Chief Justice to convene a meeting with Rules Committee to amend rule 7.3(2)

The appellant, Convoy Collateral Ltd (“Convoy”) is a company incorporated in Hong Kong. The first respondent, Broad Idea International Limited (“Broad Idea”) is a company incorporated in the Territory of the Virgin Islands (“BVI”). The second respondent, Dr. Cho Kwai Chee Roy (“Dr. Cho”), is a Hong Kong resident who owns 50.1% of the issued shares in Broad Idea. In February 2018, Convoy commenced proceedings against Dr. Cho in the High Court of Hong Kong claiming substantial damages. On 2nd February 2018, Convoy applied ex parte in the Commercial Court of the BVI, for freezing orders against Dr. Cho and Broad Idea in support of the proceedings in Hong Kong and for permission to serve Dr. Cho outside the jurisdiction. This was done to freeze all dealings with Dr. Cho’s shares in Broad Idea so that they would be available to satisfy any money judgment awarded to Convoy in the Hong Kong proceedings. On 9th February 2018, Chivers J granted the orders sought.

Following adjournments of Convoy’s application to continue the freezing order, Dr. Cho applied to set aside the orders made by Chivers J on the 9th February 2018, and for a declaration that the court should not have exercised jurisdiction over him. The set-aside application was heard by Adderley J. The learned judge found that the court did not have power to grant an order permitting service outside the jurisdiction of a freestanding injunction in support of foreign proceedings on a person who was not subject to the territorial jurisdiction of the court. Accordingly, the learned judge set aside the orders granted on 9th February 2018.

Convoy appealed against the learned judge’s order and filed four grounds of appeal. Essentially, this appeal raised three issues: (i) whether the court had jurisdiction to authorise service of an application for freestanding injunctive relief on a person outside jurisdiction pursuant to rule 7.3(2) of the Civil Procedure Rules, 2000 (“CPR”); (ii) the sufficiency of reasons given by the learned judge to support his findings in the court below; and (iii) the interpretation of rule 7.3(2) of the CPR.

Dr. Cho filed a counter-notice of appeal seeking to uphold the learned judge’s decision on grounds not dealt with by Adderley J.

Held: dismissing the appeal, allowing the counter-notice of appeal, affirming the trial judge’s findings and awarding the costs of the appeal to Dr. Cho such costs to be assessed by a judge of the Commercial Court at the rate of two-thirds of the amount assessed in the court below, that:

1. The power to serve a claim form outside the jurisdiction seeking relief is contained in rule 7.3(2)(b) of the CPR. However, rule 7.3(2)(b) does not confer extra-territorial jurisdiction on the court to authorise the service of a document on a foreigner outside of the jurisdiction where there is no substantive claim against the foreigner within the jurisdiction. The presence of assets within the jurisdiction is not a sufficient basis to give the court power under rule 7.3(2)(b) to serve a foreigner outside the jurisdiction. Accordingly, the learned judge did not err in

finding that the court did not have jurisdiction to grant free standing injunctive relief in the circumstances of this case

Rule 7.3(2)(b) of the **Civil Procedure Rules 2000** applied; **Mercedes-Benz AG v Leiduck** [1996] 1 AC 284 applied; **Siskina (owners of cargo lately laden on board) and others v Distos Compania Naviera SA** [1979] AC 210 considered; **Black Swan Investment ISA v Harvest View Ltd** BVIHCV2009/399 considered; **VTB Capital plc v Malofeev** [2011] (2) CILR 420 considered.

2. The learned judge gave ample reasons for his decision to set aside the ex parte freezing injunction and service out order made by Chivers J on 9th February 2018.

Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377 applied; **English v Emery Rheimbold & Strict Ltd** [2002] 1 WLR 2409 applied.

3. The learned judge's interpretation of rule 7.3(2) of the CPR is consistent with the decided cases and there was no need for him to resort to a purposive construction of the rule in an attempt to show that it permitted service of an application for freestanding injunctive relief on a person outside the jurisdiction. Further, the Court could not on the basis of "practicality" construe rule 7.3(2) of the CPR to allow service outside the jurisdiction for freestanding injunctions. This is a matter for the lawmakers, not the courts.

Mercedes-Benz AG v Leiduck [1996] 1 AC 284 applied.

JUDGMENT

- [1] **WEBSTER JA [AG]:** This is an appeal against the order of Adderley J dated 17th April 2019 discharging an ex parte freezing injunction and service outside the jurisdiction order made by Chivers J on 9th February 2018.

Parties

- [2] The appellant, Convoy Collateral Ltd ("Convoy"), is company incorporated in Hong Kong as a part of the Convoy Group of Companies that provides financial planning and asset management services in Hong Kong, Macau and China.

- [3] The second respondent, Dr. Cho Kwai Chee Roy (“Dr. Cho”), is a Hong Kong national residing in Hong Kong. He owns 50.1% of the issued shares in the first respondent, Broad Idea International Limited (“Broad Idea”), a British Virgin Islands (“BVI”) company. Broad Idea holds 18.85% of the shares of Town Health International Medical Group, a Cayman Islands company (“Town Health”). The estimated value of Dr. Cho’s shareholding in Broad Idea is HK\$490,387,802.

Procedural background

- [4] In February 2018, Convoy commenced proceedings against Dr. Cho in the High Court of Hong Kong claiming breach of fiduciary and other duties owed by Dr. Cho to Convoy resulting in losses of US\$92,267,194.10.
- [5] On 2nd February 2018, Convoy applied ex parte in the Commercial Court of the BVI for freezing orders against Broad Idea and Dr. Cho in support of the proceedings in Hong Kong, and for permission to serve Dr. Cho outside the jurisdiction. The application was heard by Chivers J on 9th February 2018 and he made the following orders:
- (i) that Broad Idea be restrained until the return date from dealing with or diminishing the value of its shareholding in Town Health or registering any dealings whatsoever with the said shares up to a value of US\$75,583,490.03;
 - (ii) that Dr. Cho be restrained until the return date from taking any steps to dispose of or diminish the value of his assets within the BVI, including his shareholding in Broad Idea, up to a value of US\$75,583,490.03;
 - (iii) that Dr. Cho disclose his BVI assets to the legal representatives of the Appellant; and

- (iv) that Convoy is permitted to serve Dr. Cho outside the jurisdiction at his address in Hong Kong or failing that at Broad Idea's registered agent in the BVI.

[6] Following adjournments of Convoy's application to continue the freezing order, Dr. Cho applied on 4th December 2018 to set aside the order granting leave to serve the BVI proceedings on him, for a declaration that the court does not have jurisdiction or should not exercise jurisdiction over him, and that the freezing order and other relief granted against him on 9th February 2018 be set aside. The set-aside application was heard by Adderley J on 2nd and 3rd April 2019.

[7] On 17th April 2019, Adderley J delivered a written judgment by which he found that the BVI court did not have power to grant an order permitting service outside the jurisdiction of a freestanding 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.

The Appeal

[8] Convoy appealed against the judge's order. The notice of appeal lists four grounds of appeal which can be summarised as follows:

- (i) Ground 1: The judge erred in finding that he was bound by the decision of the Privy Council in **Mercedes-Benz A.G. v Leiduck** and therefore the court did not have jurisdiction to grant free standing relief against a person who was not subject to the jurisdiction of the BVI court.
- (ii) Ground 2: This ground combines allegations that the judge misinterpreted the gateway provision in rule 7.3 (2) of the **Civil Procedure Rules 2000** ("CPR") and did not give reasons for finding that rule 7.3(2) does not provide a gateway for service of a

free standing injunction on a person who was not subject to the jurisdiction of the BVI court.

(iii) Ground 3 challenges the judge's interpretation of rule 7.3(2) on various grounds.

(iv) Ground 4 invites the Chief Justice and the Rules Committee to make rules to fill an apparent lacuna in rule 7.3(2) by permitting service of a freestanding injunction outside the jurisdiction.

I will deal with these grounds in the order listed above.

Ground 1 – Binding effect of the Mercedes-Benz case

[9] The central issue in ground 1, and in fact in the entire appeal, is whether the injunction gateway in rule 7.3(2)(b) 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 this jurisdiction. Rule 7.3(2)(b) reads "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."

[10] In **Mercedes-Benz AG v Leiduck**,¹ the Privy Council construed a similar gateway provision in the RSC Order 11 (Hong Kong), which is in substance the same as our rule 7.3(2)(b) and RSC order 11 r (1)(b)(m) of the English Rules. The majority of the Board (Lord Nichols dissenting), decided that the court did not have jurisdiction to permit service outside the jurisdiction in these circumstances.

[11] Before dealing with the **Mercedes-Benz** case, it is worth repeating briefly the history relating to the service of claims outside the jurisdiction with particular

¹ [1996] AC 284.

reference to free standing injunctions. Adderley J touched on this in paragraph 11 of his judgment. The courts in England have never had a common law or inherent power to serve proceedings on a foreigner overseas. The power to do so was introduced in England in 1852 by the Common Law Procedure Act 1852 and the rules governing the procedure were later contained in RSC order 11.

- [12] The power of the courts in the BVI to grant interim injunctions is derived from section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**² (the “Supreme Court Act”) which reads:

“(1) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the High Court or of a judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court or judge thinks just.”

The power to serve a claim form outside the jurisdiction seeking injunction relief is contained in rule 7.3(2)(b) of the CPR which is set out above.³ Like England, the BVI court does not have a common law or inherent power to serve a foreigner outside the jurisdiction with BVI proceedings.

- [13] In this case, Convoy sought to restrain Dr. Cho, a foreigner residing in Hong Kong, from dealing with his shares in Broad Idea. Broad Idea is a BVI company and under the general conflict of law rules, its shares are located as a matter of law in the BVI. The difficulty for Convoy is that it does not have a substantive claim against Dr. Cho in the BVI. What it wants to do is to freeze all dealings with Dr. Cho’s shares in Broad Idea so that they can be available to satisfy any money judgment that Convoy obtains against him in the Hong Kong proceedings. In short, Convoy sought a freestanding freezing injunction to restrain Dr. Cho from dealing with his assets in the BVI.

² Cap 80 of the Revised Laws of the Virgin Islands 1991.

³ See paragraph 9 above.

[14] The case law is against granting a freezing injunction in these circumstances. The modern starting point in this analysis is the decision of the House of Lords in **Siskina (owners of cargo lately laden on board) and others v Distos Compania Naviera SA**⁴ ("The Siskina"). The ship Siskina was a cargo vessel that sank in the Mediterranean Sea and was a constructive total loss. The Siskina was insured with Lloyds of London and the owners received in London the insurance proceeds for the loss of the vessel. The owners had no other assets. The cargo-owners did not have a legal or equitable claim to the insurance proceeds but sought a freezing injunction, then called a Mareva injunction, in England to restrain the owners of the Siskina from taking the insurance monies out of England. The matter came on appeal to the House of Lords and their Lordships set aside the freezing order previously affirmed by the majority of the Court of Appeal, finding, in effect, that the English courts did not have jurisdiction to grant a freestanding injunction. A claim for an injunction must be a part of a substantive claim for relief by the claimant that is enforceable in England by a final judgment of the High Court. The essence of the court's decision can be gleaned from Lord Diplock's speech at page 254:

"The general rule is that the jurisdiction of the English court over persons is territorial. It is restricted to those upon whom its process can be served within the territorial limits of England and Wales. To this general rule there are some exceptions. These are now to be found in Order 11 of the Rules of the Supreme Court which have statutory force by virtue of section 99 of the Supreme Court of Judicature (Consolidation) Act 1925. Order 11 permits the High Court to grant leave to a plaintiff to serve its process upon a person outside the territorial limits of England and Wales in those cases, but only in those cases, that are specified in sub-rules (a) to (o) of rule 1 (1) or in rule 2. Rule 2 deals with contracts that contain an express term conferring jurisdiction on the High Court. It is not germane to the instant appeal."

[15] The decision of the House of Lords in **The Siskina** that the English courts do not have jurisdiction to grant a freestanding freezing injunction is not binding on this

⁴ [1979] AC 210.

Court, but it is highly persuasive. It has been applied by the High Court in **Koch v Chew**⁵ and **Sibir Energy Plc v Gregory Trading et al.**⁶

- [16] The principles in **The Siskina** were applied by the Privy Council in the **Mercedes Benz** case. The claimant brought a claim for damages and other relief against the defendant in Monaco. The defendant had assets in Hong Kong in the form of shares in a Hong Kong company. The claimant was anxious to protect the enforceability of any judgment that it obtained in Monaco and so applied ex parte in Hong Kong for a worldwide freezing injunction to restrain the defendant and the Hong Kong company from dealing with any of their assets, including the defendant's shares in the Hong Kong company. A deputy judge granted both permission to serve the claim on the defendant outside the jurisdiction and a worldwide freezing injunction. The defendant applied to a judge to set aside the deputy judge's orders. The judge granted the application and set aside the orders on the ground that none of the plaintiff's claims fell within RSC order 11 rule 1(1) (Hong Kong), and leave to serve out should not have been granted by the deputy judge. RSC order 11 rule 1(1) (HK) is in substantially the same form as RSC order 11 rule 1(1)(b) in England and CPR 7.3(2)(b) in the BVI. The Hong Kong rule provides that a claim may be served outside the jurisdiction if in a claim begun by Writ "An injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction..." The Court of Appeal dismissed the claimant's appeal against the judge's orders. The claimant appealed to the Privy Council contending that RSC order 11 rule 1 (HK) enlarged the court's territorial jurisdiction to order service of originating claims for relief on a foreigner outside the jurisdiction by setting out the circumstances when such leave should be granted.⁷ Further, a claim for an injunction restraining the defendant (a foreigner) from dealing with his assets within the jurisdiction is exactly what sub-paragraph (b) of RSC order 11 r.1 contemplates and therefore there is no reason why the court's jurisdiction should

⁵ (1997/98) 1 OFLR 471.

⁶ BVIHCV2005/0174 (delivered 30th November 2005, 23rd December 2005, unreported).

⁷ The circumstances when a court in the Eastern Caribbean can grant leave are set out in sub-paragraphs (2) to (10) of rule 7.3 of the CPR.

be limited by the need for a substantive claim that is enforceable in the jurisdiction. The presence of the defendant's assets in the jurisdiction was sufficient to give the court jurisdiction.

[17] The majority of their Lordships (Lord Nicholls dissented) rejected this argument. Their Lordships stated that a claim for a Mareva injunction is a claim for injunction that is *sui juris* in that it does not decide any rights or issues between the parties, and it is not enforceable in the jurisdiction by a judgment of the court. It is no more than what it was intended to be, namely, a method to preserve the assets of the defendant and make them available in the event that the claimant is successful in the substantive proceedings and the judgment creditor needs to enforce a money judgment in circumstances where there are no other assets to satisfy the judgment. Their Lordships' pronouncements on these issues are helpful and I will refer to just a few of them.

[18] The majority decision of the Board was delivered by Lord Mustill. At page 301 he said-

"Further than this it is at present impossible to go, at least so far as concerns the law of England and Hong Kong. The most that can be said is that whatever its precise status the *Mareva* injunction is a quite a different kind of injunction from any other. The inquiry must begin by recognising that it is *sui generis*, as was the injunction inhibiting foreign proceedings granted in the *South Carolina* case: see especially the speech of Lord Brandon of Oakwood, at p. 40. Thus, it is not enough simply to say that since a *Mareva* injunction is an injunction it automatically falls within Ord. 11, r. 1 (1)(b), and that the special feature that it is not concerned with any rights justiciable within the home territory is merely one of the factors to be taken into account in the exercise of the discretion to grant leave. Rather, it must be asked whether an extra-territorial jurisdiction grounded only on the presence of assets within the territory is one which sub-paragraph (b) and its predecessors were intended to assert.

Their Lordships are satisfied that it is not. In their opinion the purpose of Ord. 11, r. 1 is to authorise the service on a person who would not otherwise be compellable to appear before the English court of a document requiring him to submit to the adjudication by the court of a claim advanced in an action or matter commenced by that document. Such a claim will be for relief founded on a right asserted by the plaintiff in

the action or matter, and enforced through the medium of a judgment given by the court in that action or matter. The document at the same time defines the relief claimed, institutes the proceedings in which it is claimed, and when properly served compels the defendant to enter upon the proceedings or suffer judgment and execution in default. Absent a claim based on a legal right which the defendant can be called upon to answer, of a kind falling within Ord. 11, r. 1(1), the court has no right to authorise the service of the document on the foreigner, or to invest it with any power to compel him to take part in proceedings against his will.”

These are very clear and powerful findings by the Board. They confirm that the English courts do not have an extraterritorial jurisdiction conferred by RSC order 11 r. 1 to permit service on a foreigner outside the jurisdiction of a claim for a freestanding injunction, restraining the foreign defendant from dealing with his assets within the jurisdiction pending the conclusion of proceedings brought against him in another jurisdiction. The decision is binding on this Court as was confirmed by Redhead JA in **Yukos CIS Investments Limited and another v Yukos Hydrocarbons Investments Limited and others; Brittany Management Limited**⁸ when he said at paragraph 99 “The Siskina is a House of Lords authority and of course followed by many courts worldwide. It is therefore very persuasive authority. The Mercedes Benz case is a Privy Council decision which is binding on our court.”

- [19] Having set out this brief background to the court’s jurisdiction, or lack thereof, to grant a freestanding injunction to restrain a foreigner from dealing with his assets in the jurisdiction, I will now apply those principles to ground 1 of the notice of appeal.
- [20] Lead counsel for Convoy, Mr. Paul McGrath, QC, submitted that this Court should not follow the decision of the Privy Council in the **Mercedes-Benz** case for at least three reasons, namely:
- (i) Under the principles of stare decisis the decision is not binding on this Court.

⁸ HCVAP 2010/028 (delivered 26th September 2011, unreported).

- (ii) The judgment of Bannister J in **Black Swan Investment ISA v Harvest View Ltd et al**,⁹ which was followed in the **Yukos** case, means that this Court is not bound by the majority judgment in **Mercedes-Benz**, and indeed this Court should now depart from that decision.
- (iii) Adderley J should have followed the approach in the Jersey Courts in recognising that the court can, without changing in the Rules, permit service out of the jurisdiction of an application for a freestanding injunction.

I will deal with these issues in the same order.

BVI court not bound by majority decision in Mercedes-Benz

- [21] In 1995 when the Privy Council handed down its decision in the **Mercedes-Benz** case, both Hong Kong and the Virgin Islands used the Privy Council as its final court of appeal. The issue for this court is whether the decision of the Board in **Mercedes-Benz** is binding on this Court or only highly persuasive.
- [22] There is a lack of uniformity in the decisions interpreting the binding effect of decisions of the Privy Council. Where the decision in question is an appeal from the same jurisdiction as the court that is considering the previous decision, there is unanimity in the cases that the decision of the Privy Council is binding on the court considering the previous decision.
- [23] The decisions from the cases are not as uniform when the court is considering a decision from another jurisdiction that also has the Privy Council as its final court of appeal. Mr. McGrath, QC referred to the 2008 decision of the Court of Final Appeal of Hong Kong in **A Solicitor v the Law Society of Hong Kong**¹⁰ where Hong Kong's final Court of Appeal decided that decisions of the Privy Council from

⁹ BVIHCV 2009/399 (delivered 23rd March 2010, unreported).

¹⁰ CACV No. 107 of 2005.

other jurisdictions were not binding in Hong Kong. On the other hand, there is the long standing Privy Council decision of **Fatuma Binti Mohamed Bin Salim Bakhshuwen v Mohamed Bin Salim Bakhshuwen**¹¹ where the Board decided that its previous decisions on the question of Mohammed law on appeals from India were binding on the Court of Appeal of East Africa. The **Bakhshuwen** case has never been overruled. Finally, this Court recently decided in **Allen Chastanet v Ernest Hilaire**¹² that decisions of the Privy Council from another jurisdiction in the Eastern Caribbean on the same point of law are binding. In my opinion the same principle applies in this case because the Privy Council's decision in **Mercedes-Benz** is from Hong Kong which is a common law jurisdiction and the point of law that was settled by the Board's decision is substantially the same point as is before this court. Further, this Court has already decided that **Mercedes-Benz** is binding.¹³

- [24] Applying the principle of stare decisis the decision in the **Mercedes-Benz** case is binding on this Court and I do not accept Mr. McGrath, QC's submission to the contrary that the decision is only persuasive authority.

The effect of the Black Swan decision

- [25] Mr. McGrath submitted that now that the Commercial Court has decided not to follow the majority decision in the **Mercedes-Benz** case and to grant a freestanding freezing injunction in circumstances where that was the only relief sought by the claimant, the way is now clear for this Court to continue the development of the law started by Bannister J in the **Black Swan** case and approved by the Court of Appeal in the **Yukos** case. I have a great deal of difficulty acceding to this submission because it puts a gloss on the fundamental underpinning of Bannister J's decision. The essential feature of the **Black Swan** case for the purposes of this appeal is that the applicant sought a freestanding injunction against companies incorporated in the BVI that were allegedly owned or

¹¹ [1952] AC 1.

¹² SLUHCVP2019/0005 (delivered 16th January 2020, unreported).

¹³ See paragraph 18 above.

controlled by a Mr. Rautenbach, a defendant in related proceedings in South Africa. Mr. Rautenbach was alleged to have assets in the jurisdiction in the form of shares in the two BVI companies. The injunction was sought against the BVI companies to prevent the dissipation of assets that were potentially available to satisfy any money judgment that the applicant obtained in the South African proceedings. The Commercial Court undoubtedly had jurisdiction over the defendant companies and there was no issue of getting leave under rule 7.3(2) of the CPR to serve the defendants outside the jurisdiction.

[26] The instant appeal is fundamentally different. The injunction sought by Convoy is to restrain a foreigner who is not and has not submitted to the jurisdiction from dealing with his assets within the jurisdiction. Convoy needed to satisfy the court that it had power under CPR 7.3(2) to order service of the application for a freestanding injunction on Dr. Cho outside the jurisdiction. The **Mercedes-Benz** case, which is binding, settled the issue that assets within the jurisdiction is not a sufficient basis to give the court power under CPR 7.3(2) to serve a foreigner outside the jurisdiction. The **Black Swan** case did not attempt to whittle down this established principle in any way. Bannister J was dealing with a situation where the court had jurisdiction over the defendant companies and what he did was to exercise that jurisdiction to grant a freestanding injunction. I do not read his judgment as opening the door to grant injunctive relief against a defendant who is not subject to the court's jurisdiction.

[27] I do not accept Mr. McGrath's invitation to extend the **Black Swan** principle to a situation where the court does not have jurisdiction over Dr. Cho, and cannot, based on the authorities, get jurisdiction over him under rule 7.3(2) or otherwise.

The approach in Jersey

[28] The third limb of Convoy's submissions on ground 1 is that the courts of the BVI should follow the approach of the courts in Jersey in their interpretation and application of the gateway provision for serving claims for injunctions outside the

jurisdiction. Much of what I say under this subhead is a summary of the very clear oral and written submissions of lead counsel for Dr. Cho, Mr. David Mumford, QC, and I gratefully adopt his submissions.

- [29] Mr. Mumford referred firstly to the decision of the Royal Court of Jersey in **Krohn GmbH v Varna Shipyard and others**.¹⁴ The claimant applied ex parte to the Royal Court for a freestanding injunction against a foreign defendant, and for leave to serve the defendant outside the jurisdiction. The Royal Court granted both applications. The Court found that there was no reason why rule 7(b) of the Service of Process (Jersey) Rules 1994, which is equivalent to rule 7.3(2)(b) of the CPR, should be construed as not allowing service outside the jurisdiction where the only relief claimed is a freestanding injunction in support of foreign proceedings. In doing so the Royal Court followed its previous decision in **Solvalub Ltd v Match Investments Ltd**.¹⁵ which decided that **The Siskina** was no longer good law in Jersey and that the court could grant a freestanding injunction in support of foreign proceedings. The decision in **Krohn** was followed by the Royal Court in **The State of Qatar v Sheikh Khalifa Bin Hamad Al-Thani and others**¹⁶ where the Royal Court justified its position for not following decisions of the superior courts of England in **The Siskina** and **Mercedes-Benz** because "...the doctrine of stare decisis as expounded by the English Courts is not a part of the law of Jersey."¹⁷ In arriving at this decision The Bailiff, Sir Phillip Bailhache, relied on the fact that the law of Jersey developed differently than in England, or, I may add, Commonwealth countries. Jersey's law is based more on French law which is not subject to the strict rules of binding precedent. The Royal Court was, therefore, free to rid itself of the strictures of **The Siskina** and **Mercedes-Benz** and interpret its Rules to allow the grant of freestanding injunctions and service thereof on persons outside the jurisdiction.

¹⁴ [1997] JLR 194.

¹⁵ (1997/98) 1 OFLR 152.

¹⁶ [1999] JLR 118.

¹⁷ Ibid The Bailiff (Sir Phillip Bailhache) at page 6.

[30] The courts in the Cayman Islands took a different position and decided not to follow the route taken by the Royal Court of Jersey. In **VTB Capital plc v Malofeev**¹⁸ the Court of Appeal decided that it did not have power to grant permission to serve an application for a freestanding injunction out of the jurisdiction under the injunction gateway in the Cayman Islands (RSC Order 11 r 1(1)(b)). The unanimous judgment of the Grand Court was delivered by Chadwick P. The learned President referred to the decisions of the Royal Court up to and including the decision in the **Al Thani** case and noted:

“Having satisfied himself that courts in Jersey could treat themselves as free from the fetters of the Mercedes case, on grounds that they were not bound by the principles of precedent which are commonly applied in, for example, this jurisdiction, the Jersey court followed Krohn. In my view, there is nothing in the judgments in the Royal Court in Jersey which should lead this court to the conclusion that courts in this jurisdiction can properly disregard the law as expounded in the Mercedes case.”¹⁹

[31] The situation in the BVI is the same as in the Cayman Islands. The doctrine stare decisis is still very much a part of the law, and, as found above, the BVI courts are bound by the decision of the Privy Council in **Mercedes-Benz** that the court does not have jurisdiction to grant a free standing Mareva injunction in support of foreign proceedings against a person who is not subject to the court's jurisdiction. It follows that even if I was minded to make such an order for service out in these circumstances, and I am not, I could not because I am bound by the doctrine of stare decisis to follow the decision of the Privy Council in the **Mercedes-Benz** case.

[32] Before leaving this ground I must deal with the alternative position advanced by Mr. Mumford, QC. He submitted that the way to give the judiciary the power to grant freestanding injunctions against persons who are not subject to the court's jurisdiction is by legislation, rather than by arrogating legislative power unto itself to expand the court's jurisdiction. This was the view expressed by Lord Mustill at the end of the majority judgment in the **Mercedes-Benz** case when he said “Their

¹⁸ [2011] (2) CILR 420.

¹⁹ Supra at paragraph 29.

Lordships believe that it would merit the close attention of the rule-making body to consider whether, by an enlargement of R.S.C., Ord. 11, r. 1(1), a result could be achieved which for the reasons already stated is not open on the present form of the rule.” Chadwick P expressed a similar view in the **VTB Capital** case. He referred to the desirability of being able to order service out of freestanding injunctions and continued “...*that may well be a desirable step to take, but it is a step which should be taken by the rule-making body, or perhaps the legislature in this jurisdiction.*”²⁰ The Cayman Islands have taken the necessary legislative steps by inserting a new section 11A into the Grand Court Law giving the Grand Court jurisdiction to grant interim relief in the absence of substantive proceedings in the Islands, and a new rule in RSC order 11(1)(n) permitting service out where “the claim is brought for any relief pursuant to section 11A of the Grand Court Law (as amended)”. Thus, the Cayman Islands, and other countries including England that have made the legislative and rule changes, can now turn to updated legislation and rules to deal with applications for permission to serve freestanding injunctions outside the jurisdiction.

- [33] The Virgin Islands, like the Cayman Islands, is an offshore financial centre. It is home to numerous companies and it may very well be that the law-making and rule-making bodies in this Territory should consider enacting similar amendments to the Supreme Court Act and the Civil Procedure Rules as was done in England and the Cayman Islands. Until this is done the courts of the Virgin Islands will not be able to grant freestanding injunctions to secure assets in the Territory in support of litigation in another country.

Grounds 2 and 3 - No reasons for decision and interpretation of the injunction gateway

- [34] Ground 2 combines allegations that Adderley J did not give reasons for finding that rule 7.3(2) does not provide a gateway for service of a freestanding injunction and

²⁰ Supra at paragraph 30.

that he misinterpreted rule 7.3(2) of the CPR. Ground 3 challenges the judge's interpretation of rule 7.3(2) on various grounds.

Reasons for decision

[35] Mr. McGrath, QC submitted that the learned judge should not have rejected Convoy's position that rule 7.3(2) of the CPR provided a gateway to grant permission to serve an application for a freestanding injunction outside the jurisdiction without providing any reasons for so doing. This submission is not supported by the copious reasons given by the learned judge for deciding that rule 7.3(2) does not allow service outside the jurisdiction of a freestanding injunction. The reasons include, and are not limited to, the following findings:

- (a) The learning in cases such as **Mercedes-Benz**²¹ and **Masri v Consolidated Contractors International**²² that the court does not have an inherent jurisdiction to serve foreigners outside the jurisdiction (paragraphs 10 and 11 of the judgment).
- (b) On a proper construction, rule 7.3(2) empowers service out of a claim form but not an application for a freestanding injunction (paragraph 22 et sequi).
- (c) The decision of the Privy Council in the **Mercedes-Benz** case is binding and must be followed (paragraph 35 and passim).
- (d) It is for the legislature, and not the courts, to expand the court's jurisdiction to include extra-territorial service of applications or claims for freestanding injunctions (paragraph 69).

This list is no means exhaustive. I am satisfied that Adderley J provided ample reasons for his decision on the meaning of rule 7.3(2). The judgment complies

²¹ Supra note [1].

²² [2010] 1 AC 90.

with the requirements in the leading cases of **Flannery v Halifax Estate Agencies Ltd**²³ and **English v Emery Rheimbold & Strict Ltd**.²⁴ Convoy could not have been under any illusion as to the why the learned judge came to the decision that he did.

Interpretation of Rule 7.3(2)

[36] The second part of ground 2 and all of ground 3 involve challenges to the judge's interpretation of rule 7.3(2). Mr. McGrath submitted that the judge erred in construing rule 7.3(2) because:

- (a) he failed to give effect to the plain and natural meaning of the words in the rule;
- (b) he failed to adopt a purposive construction of the rule 7.3(2); and
- (c) he failed to interpret rule in the context of rule 7 as a whole.

[37] The alleged errors in subparagraph (a) and (b) were considered in substance by the Privy Council in the **Mercedes-Benz** case and the majority of Their Lordships concluded:

“... the purpose of Ord. 11, r. 1 is to authorise the service on a person who would not otherwise be compellable to appear before the English court of a document requiring him to submit to the adjudication by the court of a claim advanced in an action or matter commenced by that document. Such a claim will be for relief founded on a right asserted by the plaintiff in the action or matter, and enforced through the medium of a judgment given by the court in that action or matter. The document at the same time defines the relief claimed, and when properly served compels the defendant to enter upon the proceedings or suffer judgment and execution in default. Absent a claim based on a legal right which the defendant can be called upon to answer, of a kind falling within Ord. 11, r. 1(1), the court has no right to authorise the service of the document on the foreigner, or to invest it with any power to compel him to take part in proceedings against his will. Thus, at the centre of the powers conferred by Ord 11 is a proposed action or matter which decided upon and give effect to rights. An application for Mareva relief (a freezing injunction) is not of this character. When ruled upon it decides no rights, and calls into existence no process

²³ [2000] 1 WLR 377.

²⁴ [2002] 1 WLR 2409.

by which the rights will be decided...This opinion, that Order 11 is confined to originating documents which set in motion proceedings designed to ascertain substantive rights, is borne out by its language.”²⁵

- [38] The decision of the Privy Council, which is binding on this Court, effectively disposes of Mr. McGrath’s submissions that CPR rule 7.3(2) should be construed literally or purposively to allow service of an application for freestanding injunctive, which is an originating process in the BVI, on a person outside jurisdiction. The effect of the decision of the majority of the Board is that order 11 r. 1 (our rule 7.3(2)) is limited to permitting service outside the jurisdiction of claims for substantive relief available and enforceable within the jurisdiction. Put another way, rule 7.3(2) allows the court to permit the service of claim forms outside the jurisdiction, but not applications for freestanding injunctive relief.
- [39] I also disagree with Mr. McGrath’s reliance on rule 7.14(2) of the CPR in support of his submission that the judge did not construe rule 7.3(2) properly in the context of rule 7 as a whole. The judge did not err in not 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 applicant for a freestanding injunction in support of foreign proceedings must obtain permission to serve application out of the jurisdiction and for all of the reasons set out above the court does not have power to give such permission.
- [40] Finally on the issue of interpretation, Mr. McGrath, QC submitted that for practical reasons the BVI Court should construe rule 7.3(2) to allow service out of the jurisdiction of freestanding injunctions. Persons with proper claims in foreign courts should be able to secure the assets of the defendants to those proceedings who chose to place their assets in the jurisdiction, usually by using BVI

²⁵ Supra note [1] at page 301.

companies. While I share Mr. McGrath's concern about being able to pursue such persons and their assets effectively, this should not be done by a strained interpretation of the rules. As stated above, this is a matter for the lawmakers and rule-makers, not the courts.

[41] I would dismiss grounds 2 and 3.

Ground 4 – Invitation to amend rule 7.3(2)

[42] Ground 4 is an invitation to the Chief Justice to urgently convene a meeting of the Rules Committee to exercise their power to remedy the lacuna in rule 7.3(2) to allow service of a freestanding injunction out of the jurisdiction in order to bring the BVI in line with other major common law jurisdictions. Mr. McGrath, wisely, did not pursue this ground of appeal at the hearing of the appeal.

The counter notice of appeal

[43] Dr. Cho's counternotice of appeal essentially seeks to uphold the judge's decision on grounds not dealt with by Adderley, J. Having regard to my findings above, I do not need to deal with the matters raised in the counter notice other than to say that it is granted.

Conclusion

[44] Adderley J wrote a comprehensive judgment on the issues raised in this matter and there is no basis for this Court to interfere with any of his findings.

[45] I would dismiss the appeal, allow the counter-notice of appeal and affirm the trial judge's findings. Costs of the appeal to Dr. Cho at the rate of two-thirds of the amount assessed in the court below.

[46] The judgment of the court will not take effect until Wednesday, 1st April, 2020 at 12:00 noon.

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal

By the Court

Chief Registrar