

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2024/0031

BETWEEN:

NKT

Appellant

and

**[1] NMH
[2] ATG**

Respondents

Before:

The Hon. Mr. Gerard St. C. Farara
The Hon. Mde. Ingrid Mangatal
The Hon. Mde. Paula Gilford

Justice of Appeal [Ag.]
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Alain Choo-Choy KC with him Mr. Christopher McCarthy for the appellant
Mr. Ben Valentin KC with him Mr. Andrew Trotter, Ms. Claire Goldstein and Mr. James Petkovic for the respondents

2025: June 20;
2026: January 30.

Commercial appeal - Court's power and jurisdiction to join parties – Arbitration Award – CPR 2000 Part 19, 48 –Arbitration Act – Business Companies Act – Judgments Act – Whether the learned judge erred in law when he concluded that the appellant had been properly joined as a defendant to the claim despite having found that there was no pleaded case against the appellant – Whether the learned judge erred in law in concluding that gateways for permission to serve the appellant outside of the jurisdiction were satisfied – Whether the learned judge erred in law in finding that there was a basis for a charging order application (and other ancillary relief) to be served on the appellant outside of the jurisdiction – Whether the learned judge erred in holding in the course of judgment that a charging order personal jurisdiction does not need to be established over the party whose assets are sought to be charged and that a final hearing can proceed without personal jurisdiction being established over that party – Whether the learned judge erred when making a costs order in relation to the application without having sought representations from the parties before doing so

This is an interlocutory appeal filed by the appellant (“Mr. Shani”) on 31st January 2025 against the decision of a judge of the Commercial Division of the High Court of Justice in the Territory of the Virgin Islands dated 31st October 2024 (“the judgment”), wherein the learned judge (amongst other matters), dismissed Mr. Shani’s application to set aside certain aspects of an *ex parte* order made on 28th November 2023.

On 23rd March 2023, the respondents, Iraq Telecom Limited and Industrial Holdings Limited (“the respondents”), obtained an International Court of Commerce (“ICC”) arbitration award by a tribunal seated in the Dubai International Financial Centre. The award ordered the 1st defendant (in the court below) Sirwan Saber Mustapha, also known as Mr. Barzani (“Mr. Barzani”), to pay to the respondents an amount in excess of U.S. \$1.6 billion (“the Award”). The appellant, Mr. Shani, was not a party to, nor involved in any way in the arbitration proceedings that culminated in the Award.

On 11th April 2023, the respondents issued a Claim in the Commercial Division against Mr. Barzani seeking registration of the Award as a judgment and permission to enforce the Award/judgment. In making that application, the respondents stated that they believed Mr. Barzani had assets within the British Virgin Islands (“BVI”), which they wished to enforce against. At that stage, no issue of joinder of Mr. Shani was raised by the respondents. On 30th May 2023, the High Court granted the relief sought, and an associated freezing injunction, which Mr. Barzani has not applied to set aside. It is not in dispute that the Award remains wholly unsatisfied and continues to accrue interest.

In an affidavit filed on 26th June 2023, Mr. Barzani claimed that he does not have any assets within the jurisdiction, which claim the respondents disputed. The respondents alleged that Mr. Barzani owns shares in a BVI company, namely OS International Limited (“OSI”). OSI is a 66% shareholder in another BVI company, Oilserv Holding Ltd. (“OHL”), which is itself a 100% shareholder in Oilserv Oilfield Services (BVI) Ltd. (“OOS”), a BVI company, and Oilserv Iraq, an Iraqi company. These companies are engaged in the oil and gas business in Iraq and elsewhere. However, Mr. Barzani is not the registered shareholder of shares in OSI. The only registered shareholders are Mr. Amjad Saidgul Babasheikh (“Mr. Babasheikh”) and Mr. Shani.

The respondents filed an *ex parte* application for a charging order against the beneficial interest in shares in OSI (“the Shares”) on the basis that, although Mr. Shani is registered as the legal owner of the Shares, he holds them as nominee for Mr. Barzani, who the respondents say is their beneficial owner.

By *ex parte* order dated 28th November 2023, Wallbank J [Ag.]: (i) joined Mr. Shani as a party to the Arbitration Award Recognition Proceedings; (ii) granted a provisional charging order over the Shares; (iii) ordered the respondents to serve the order and supporting evidence on Mr. Shani and Mr. Barzani; (iv) granted a proprietary injunction to secure the Shares and a freezing injunction restraining Mr. Shani from dealing with them; and (v) granted the respondents permission to serve all relevant proceedings (including the Arbitration Award Recognition Proceedings claim form issued in the enforcement

proceedings against Mr. Barzani), on Mr. Shani out of the jurisdiction (“the Ex Parte Order”).

On 3rd April 2024, Mr. Shani filed an application to set aside the *Ex Parte* Order in which he also objected to the provisional charging order being made final on the ground that he, not Mr. Barzani, is the beneficial owner of the shares.

On 31st October 2024 the judge having considered the pleadings, evidence, written and oral submissions of counsel, ordered as follows: (1) that subject to paragraph 2 below, the application filed by Mr Shani on 3rd April 2024 to set aside the orders of Wallbank J (Ag.) made on 28th November 2023 is dismissed; (2) the freezing injunction against Mr. Shani made on 28th November 2023 is discharged; (3) there will be a trial in these proceedings as to the beneficial ownership of the shares held by Mr. Shani in OS International Holdings Limited; (4) the Court, in consultation with the legal practitioners for the parties, will fix a date and time for (i) a directions hearing to give directions for the filing of pleadings and evidence and other interlocutory matters in the trial; (ii) the reserved costs of the extension application by the Claimants filed on 3rd April 2024; (iii) the reserved costs of the directions application filed by the Claimants on 16th May 2024 and heard on 25th June 2024; and (5) Costs of the Set Aside Application to the Claimants to be paid by Mr. Shani, such costs to be assessed if not agreed within 21 days of the date of the said order.

Being dissatisfied with this decision, this appeal was filed by Mr. Shani against parts of the orders made at paragraph 74 which are recited above, but excluding the learned judge’s order discharging the freezing injunction at sub-paragraph 74(2) of the judgment.

The grounds of appeal are that the learned judge erred in law when he concluded that the appellant had been properly joined as a defendant to the claim despite having found there was no pleaded case against the appellant; the learning judge therefore erred in law in concluding that gateways for permission to serve Mr. Shani outside of the jurisdiction were satisfied; accordingly, that learned judge erred in law in finding that there was a basis for a charging order application (and other ancillary relief) to be served on the appellant outside of the jurisdiction; to the extent that the learned judge in the course of judgment held that in relation to a charging order personal jurisdiction does not need to be established over the party whose assets are sought to be charged and that a final hearing can proceed without personal jurisdiction being established over that party, the learned judge erred; and the learned judge erred when making a costs order in relation to the application without having sought representations from the parties before doing so.

Held: dismissing the appeal with costs on the appeal and costs in the court below awarded to the respondents to be assessed by a Judge or Master of the High Court (Commercial Court), if not agreed within twenty-one (21) days of the date of delivery of this judgment, that:

1. The absence of a pleaded case against the appellant in the Arbitration Award Registration Proceedings was not a relevant consideration for the purposes of the joinder application. The matters in issue in a joinder application do not have to include a cause of action against the person to be joined. What is required is that

the issue to be determined is connected to the matters in dispute in the proceedings, and the word 'proceedings' in the CPR is to be given a broad interpretation. The learned judge was correct in his analysis of the legal issues and there is no basis on which his reasoning can be faulted. Although there was no pleaded case against Mr. Shani in the original claim form, this did not preclude joinder because CPR 19.2(3) expressly empowers the court to add a new party if it is desirable so that the court can resolve all the matters in dispute in the proceedings, or if there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue. The learned judge's approach was also consistent with the overriding objective under CPR 1.1 which mandates dealing with cases justly and efficiently. Moreover, the joinder ensures procedural fairness by allowing Mr. Shani to be heard and be bound by the determination of beneficial ownership.

Rules 1.1 and 10.2(3) of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** applied; **C Inc v L & Anor** [2001] CLC 1054 applied; **XYZ v. Various (Transformation Medical Group) Limited and others** [2014] EWHC 4056 applied; **In re Pablo Star** [2018] 1 WLR 738 applied; **Re Bleinheim Leisure (Restaurants) Ltd.** [2000] BCC 544 applied.

2. The learned judge did not fall into error when he refused to set aside the service out aspect of the *ex parte* order and found that the gateway in CPR 7.3(2)(a) clearly applied. The judge considered the principles to be applied in respect of a valid service out order. Those principles are well-known and are, that in relation to a defendant that is outside of the jurisdiction, there is a serious issue to be tried on the merits; there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given; and in all the circumstances the forum which is being seized is clearly or distinctly the appropriate forum for the trial of the dispute. Further, that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. The judge then applied these principles to the case and found that all three principles were met. If it was right for Mr. Shani to be joined as a party, it was clear that the 'necessary or proper' gateway under CPR 7.3(2)(a) was engaged. It is the description of 'proper' that is particularly applicable in the instant case. The 'necessary or proper gateway' is 'no less wide' than the court's power to add or substitute a party under CPR 19.2(2).

AK Investment CJSC v Kyrgyz Mobil Tel [2012] 1 WLR 1804 (UKPC) applied; **United Film Distribution Ltd. v Chhabria** [2001] EWCA Civ 416 applied.

3. The learned judge was plainly right to find that a 'good arguable' case regarding gateways was made out and correct in finding that these aspects of the *ex parte* order were also valid, and accordingly these findings ought not to be disturbed.

Rules 7.3(2)(a), 7.3(10) and 7.14 of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** applied; section 7(1) of the **Eastern Caribbean Supreme**

Court (Virgin Islands) Act applied; **Oscar Trustee** BVIHCM2021/0022 (delivered 18th April 2024, unreported) distinguished; **Nilon Ltd and another v Royal Westminster Investment SA and others** (2015) 86 WIR 285 applied.

4. It is well known that a charging order creates proprietary rights. Since the order creates an interest in property, it can only attach to shares in companies within the jurisdiction. A charging order can be made against the judgment debtor's beneficial interests in stocks and shares that are not registered in his name if the court is satisfied of such beneficial interest. The court would have to conduct a trial to determine a factual dispute arising in relation to the beneficial ownership, in the context of a charging order, where the individuals claiming to be both the legal owners and the true beneficial owners are outside of the court's jurisdiction. The learned judge's approach, and his treatment, particularly of the CPR Part 48 rules and joinder issues in the judgment, amply demonstrate that he fulfilled the court's duty with regard to the overriding objective.

Rules 1.1, 1.2, and Part 48 of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** applied; **BCS Corporate Acceptances Ltd. et al v Daniel Terry** [2018] EWHC 2349 (QB) applied; **Hardy Exploration & Production (India) Inc v Government of India (India Infrastructure Finance Co (UK) Ltd, third party)** [2019] QB 544 applied; **Dicey**, Morris & Collins on the Conflict of Laws (16th edition) considered; **Cooper v Griffin** [1892] 1 QB 740 considered; **Bolland v Young** [1904] KB 824 applied; **Rosseel NV v Oriental Commercial and Shipping (UK) Ltd. et al** (1991) WL 838487 applied.

5. Even if Mr. Shani were to succeed at trial in establishing that he is the beneficial owner of the shares, the issues that were dealt with in the court below, i.e. joinder, service and the court's jurisdiction would not arise for consideration again at the trial, or at its close. Thus, there was no reason for the learned judge to delay in making a costs order. An appellate court will not interfere with the exercise of a trial judge's discretion unless it is satisfied that the judge erred in principle, by either failing to take into account relevant considerations, giving too little or too much weight to relevant factors, or by taking into account irrelevant considerations. The manner in which the learned judge exercised his discretion in relation to the costs order cannot be faulted. The overall outcome of the application was in the respondents' favour. Although the appellant succeeded in obtaining the discharge of the freezing order, this was ancillary and did not alter the respondents' substantive success. The learned judge was entitled to regard the respondents as the successful parties and to award them their costs.

Rule 64.6(1) of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** applied; **JTrust Asia PTE Ltd. v Mitsui Konoshita et al** BVIHMAP2020/2022 (delivered 31st May 2021, unreported) followed.

JUDGMENT

- [1] **MANGATAL JA [AG.]:** This is an interlocutory appeal filed by the appellant (second defendant in the court below)/Zekri Basheer Shani (“Mr. Shani/the appellant”) against the decision of Webster J [Ag.], (“the learned judge/ the judge”) sitting as a judge in the Commercial Division of the High Court of the British Virgin Islands. In a judgment dated 31st October 2024 (“the judgment”), the learned judge (amongst other matters), dismissed Mr. Shani’s application to set aside certain aspects of an *ex parte* order made on 28th November 2023, the terms of which are set out at paragraph 9 below.
- [2] The appeal involves important points, including the court’s jurisdiction, its power to join parties under Part 19 and the width of Part 48 of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** (“CPR 2000”). Prior to the hearings in the court below, it was common ground between the parties that the applicable rules were the CPR 2000. Part 48 provides for enforcement of judgments by way of charging orders on stock, shares and other personal property.

Background to the Application

- [3] On 23rd March 2023, the respondents (claimants in the court below) to this appeal, Iraq Telecom Limited and Industrial Holdings Limited (“the respondents”), obtained an International Court of Commerce (“ICC”) arbitration award in their favour made by a tribunal seated in the Dubai International Financial Centre. By this award, the 1st Defendant Sirwan Saber Mustapha, also known as Mr. Barzani (“Mr. Barzani”), was ordered to pay to the respondents an amount in excess of U.S. \$1.6 billion (“the Award”). Mr. Shani was not a party to, nor involved in any way in the arbitration proceedings that culminated in the Award.

- [4] On 11th April 2023, the respondents issued a Claim Form pursuant to sections 84 to 86 of the **Arbitration Act**¹ (“the Arbitration Award Recognition Proceedings”) seeking registration of the Award as a judgment and permission to enforce the Award/judgment. On 30th May 2023, the High Court granted the relief sought, and an associated freezing injunction, which Mr. Barzani has not applied to set aside. At the time of that application the respondents had stated that they believed Mr. Barzani had assets within the British Virgin Islands (“BVI”), which they wished to enforce against. At that stage, no issue of joinder of Mr. Shani was raised by the respondents.
- [5] It is not in dispute that the Award remains wholly unsatisfied and continues to accrue interest.
- [6] In an affidavit filed on 26th June 2023, Mr. Barzani claimed that he does not have any assets within the jurisdiction. The respondents disputed this and alleged that Mr. Barzani owns shares in a BVI company, namely OS International Limited (“OSI”). OSI is a 66% shareholder in another BVI company, Oilserv Holding Ltd. (“OHL”), which is itself a 100% shareholder in Oilserv Oilfield Services (BVI) Ltd. (“OOS”), a BVI company, and Oilserv Iraq, an Iraqi company. These companies are engaged in the oil and gas business in Iraq and elsewhere.
- [7] Mr. Barzani is not the registered shareholder of shares in OSI. The only registered shareholders are Mr. Amjad Saidgul Babasheikh (“Mr. Babasheikh”) and Mr. Shani.
- [8] The respondents filed an *ex parte* application under Part 48 of the CPR for a charging order against the beneficial interest in shares in OSI (“the Shares”). The stated basis of the application was that, although Mr. Shani is registered as the legal owner of the Shares, he holds them as nominee for Mr. Barzani, who the

¹ Arbitration Act, Revised laws of the Virgin Islands 2013.

respondents say is their beneficial owner. The application pursuant to CPR Part 48 was filed in the same Arbitration Award Recognition Proceedings.

- [9] By order dated 28th November 2023, the Commercial Court (Wallbank J [Ag.]): (i) joined Mr. Shani as a party to the Arbitration Award Recognition Proceedings; (ii) granted a provisional charging order over the Shares; (iii) ordered the respondents to serve the order and supporting evidence on Mr. Shani and Mr. Barzani; (iv) granted a proprietary injunction to secure the Shares and a freezing injunction restraining Mr. Shani from dealing with them; and (v) granted the respondents permission to serve all relevant proceedings (including the Arbitration Award Recognition Proceedings claim form issued in the enforcement proceedings against Mr. Barzani), on Mr. Shani out of the jurisdiction (“the *Ex Parte* Order”).

The set-side Application and Orders Appealed

- [10] On 3rd April 2024, Mr. Shani filed an application to set aside the *Ex Parte* Order. He also objected to the provisional charging order being made final on the ground that he, not Mr. Barzani, is the beneficial owner of the shares.

- [11] In the Notice of Appeal filed on 31st January 2025, it is indicated that the appeal is against parts only of the judgement and order. Reference was made to paragraph 74, sub-paragraphs 1 to 5 of the judgment, where the learned judge ordered the disposition of the application as follows:

“74. ...

- (1) Subject to paragraph 2 below, the application by Mr Shani [the appellant] filed on 3 April 2024 to set aside the orders of Wallbank J made on 28 November 2023 is dismissed.
- (2) The Freezing Injunction against Mr Shani [the appellant] on 28 November 2023 is discharged.
- (3) There will be a trial in these proceedings of the beneficial ownership of the shares held by Mr Shani in OS International Holdings Limited [OSI] (“**the Trial**”).

- (4) The Court, in consultation with the legal practitioners for the parties, will fix a date and time for (i) a directions hearing to give directions for the filing of pleadings and evidence and other interlocutory matters in the Trial (ii) the reserved costs of the extension application by the Claimants [the respondents] filed on 3 April 2024; (iii) the reserved costs of the directions application filed by the Claimants [respondents] on 16 May 2024 and heard on 25 June 2024.
- (5) Costs of the Set Aside Application to the Claimants [respondents] to be paid by Mr Shani [the appellant], such costs to be assessed if not agreed within 21 days of the date of this order.”

[12] The Notice of Appeal indicated that the appeal relates to the matters set out in sub-paragraphs 74 (1) and (5) of the judgment referred to above. There is no appeal against the learned judge’s order discharging the freezing injunction at sub-paragraph 74 (2) of the judgment.

The Grounds of Appeal

[13] The stated grounds of appeal are as follows:

“Ground 1:

- (1) The learned judge erred in law when he concluded that the Appellant had been properly joined as a defendant to the claim despite having found that there was no pleaded case against the Appellant;
- (2) The learned judge therefore erred in law in concluding that gateways for permission to serve Mr Shani outside of the jurisdiction were satisfied;
- (3) Accordingly, the learned judge erred in law in finding that there was a basis for a charging order application (and other ancillary relief) to be served on the Appellant outside of the jurisdiction.

Ground 2:

- (1) To the extent that the learned judge in the course of judgment held that in relation to a charging order application personal jurisdiction does not need to be established over the party whose assets are sought to be charged and that a final hearing

can proceed without personal jurisdiction being established over that party, the learned judge erred.

Ground 3:

- (1) The learned judge erred when making a costs order in relation to the application without having sought representations from the parties before doing so.”

[14] The Notice of Appeal seeks the following orders:

- “(i) The appeal is allowed and the order of Justice Webster at paragraphs 1 and/or 4 are set-aside.
- (ii) Accordingly, that the orders obtained on 28 November 2023 are set aside.
- (iii) The directions for a CMC [Case Management Conference] in relation to the claim are therefore vacated.
- (iv) The respondents pay the appellant’s costs of the appeal and the proceedings below within 21 days of the date of the order, to be assessed if not agreed.”

GROUND 1- (1): The learned judge erred in law when he concluded that the Appellant had been properly joined as a defendant to the claim despite having found that there was no pleaded case against the Appellant

Appellant’s Submissions on Ground 1(1)

[15] In the written submissions filed on behalf of Mr. Shani, and in the oral submissions advanced by Mr. Choo-Choy KC, it is opined that the fundamental issue in the appeal is the method by which the respondents should establish the court’s jurisdiction over Mr. Shani, who is resident outside the jurisdiction, and then demonstrate that he does not beneficially own the shares in OSI that are registered in his name. This must be done, it was submitted, in a procedurally fair manner. It was asserted that Mr. Shani has property rights in OSI which are registered and presumed to be his and are clearly at stake. These rights can only be dealt with in accordance with the CPR.

[16] Mr. Choo-Choy KC criticized the fact that the respondents chose to achieve this by applying *ex parte* within their existing sealed and *ex parte* Arbitral Award Recognition Proceedings under section 84 to 86 of the **Arbitration Act** to add Mr. Shani to those concluded proceedings. Learned King’s Counsel maintained that this was further exacerbated by the fact that this application was made without amending the claim form or pleading any case against Mr. Shani, and without notice to him. All whilst simultaneously applying *ex parte* for an interim charging order against Mr. Shani’s shares in OSI, as well as proprietary and freezing injunctions. Learned King’s Counsel asserted that the respondents’ success in obtaining these orders immediately put Mr. Shani ‘*on the backfoot*’.

[17] Before this Court it was contended that the judge ought to have accepted that:

- (a) In order to establish the BVI Court’s jurisdiction over him, Mr. Shani needed to be joined to existing proceedings, or be a party to new proceedings, issued by originating process (in this case a claim form with accompanying statement of case) in which some basis for a claim against him was pleaded and that, before this originating process could be served on him outside of the jurisdiction, permission to do so was required.
- (b) Only after those stages had been satisfied i.e., the permission to serve out test in **AK Investment CJSC (Appellant) v Kyrgyz Mobil Tel Limited and ors**,² or **Nilon Ltd and another v Royal Westminster Investment SA and others**³ and, if applicable, the test set out in **In re Pablo Star Ltd; Price v Registrar of Companies**⁴ for joinder, would it then be permissible under the CPR to serve on him a notice of application within those proceedings- **Convoy Collateral Ltd. v Broad Idea International Ltd and Cho Kwai Chee (“Dr. Cho”)**,⁵ a decision of the Eastern Caribbean Supreme Court, Court of Appeal and the Privy Council’s decision in the same case, **Convoy Collateral Ltd v Broad Idea International Ltd “Broad Idea”**,⁶ and **Oscar Trustee Ltd. v MBS Software Solutions (“Oscar Trustee”)**.⁷

² [2011] UKPC 7.

³ (2015) 86 WIR 285.

⁴ [2018] 1 WLR 738.

⁵ BVIHCMAP2016/0030 (delivered 30th March 2020, unreported).

⁶ [2023] AC 389.

⁷ BVIHCOM2021/0022 (delivered 18th April 2024, unreported).

- (c) It was further not permissible, for the interim charging order application *itself* (learned King's Counsel's emphasis) to be the originating process against him constituting the first point at which the court below asserted jurisdiction over any dispute as to beneficial ownership in OSI involving him. Additionally, he could not be joined to proceedings in which there was in fact no claim against him.
- (d) Accordingly, there was no legal or procedural basis to join him to the existing proceedings, or to serve him outside of the jurisdiction, when those proceedings were concluded arbitration recognition proceedings solely seeking relief against others under sections 84 to 86 of the **Arbitration Act**. Further, none of the issues that would normally arise in such a claim concerned Mr. Shani or the beneficial ownership of any property. Additionally, and (as is admitted and the judge accepted) no original case or amended claim had been set out against Mr. Shani in relation to the allegation of the respondents that he did not beneficially own the shares in OSI registered in his name. Put shortly, there was no claim at all against Mr. Shani concerning his ownership of the OSI shares nor any nominee claim.⁸

[18] Accordingly, Mr. Shani seeks to persuade this Court that the orders obtained *ex parte* should have been set aside. It would then, the argument continued, be up to the respondents to correct the procedural position if they wished to continue the beneficial ownership claim against Mr. Shani either by seeking and obtaining permission to amend the existing claim to plead a claim against him, or by issuing new proceedings. The judge rejected that argument and Mr. Choo-Choy submitted that he erred in law in doing so.

[19] The primary submission advanced on behalf of Mr. Shani was that the court has no inherent power or jurisdiction to make orders against persons outside of its territorial jurisdiction. The presumption is that the court's coercive powers operate territorially. It was submitted that it is only where the court is expressly authorized by statute that, exceptionally, orders can be made against persons outside the jurisdiction⁹. It was also argued that under the procedural rules applicable to this

⁸ Paragraph 12 of the Appellant's Skeleton Arguments, pages 4-5 of the Hearing Bundle.

⁹ BVIHCMAP2019/0020 (delivered 29th August 2019, unreported) at para. 11.

case, it is only the issue and service of a claim form setting out a claim for relief against the non-resident that can establish the Court's jurisdiction.¹⁰

[20] On behalf of Mr. Shani, it was asserted that the well-established matters that a claimant must satisfy the court of in order to obtain permission to serve the originating process (the claim form) out of the jurisdiction on a non-resident party are as follows:

- (a) the claim against the non-resident party has a serious issue to be tried on the merits;
- (b) there is a good arguable case that a gateway permitting service out of the jurisdiction applies; and
- (c) the BVI is clearly and distinctly the appropriate forum for trial of the dispute between the claimant and the non-resident party, such that in all the circumstances of the case the Court should exercise its discretion to permit service outside of the jurisdiction.¹¹

[21] In this respect, Mr. Choo-Choy opined that the court below (rightly) concluded that there

“...is no pleaded claim against Mr. Shani in the fixed date claim form and the proceedings that followed for the registration of the Award...”¹²

[22] It was Mr. Shani's position that the test for permission to serve the existing unamended claim form seeking recognition relief against Mr. Barzani on Mr. Shani out of the jurisdiction simply could not have been satisfied. This was opined to be because there was indeed no claim against him at all.

[23] Mr. Choo-Choy points out that the respondents relied in the court below on what was stated in the first affidavit of Mr. Harb (“**Harb 1**”), a lawyer who acted on behalf of the claimant in the ICC arbitration proceedings. Harb 1 was filed in support of the Arbitration Award Recognition Proceedings against Mr. Barzani. Mr. Choo-Choy's position was that even if it could be said to constitute a pleading,

¹⁰ BVIHCMAP2019/0020 (delivered 29th August 2019, unreported), at paras. 12 and 14.

¹¹ Nilon Limited v Royal Westminster Investment S.A. (2015) 86 WIR 285 and other authorities.

¹² Paragraph 24 of the judgment dated 31st October 2024 located at pages 286-309 of the Hearing Bundle.

(which he argues it could not), the contents of Harb 1 raise '*no serious issue to be tried*' against Mr. Shani.

The Respondents' Submissions on Ground 1(1)

[24] It was submitted by Mr. Valentin KC that, for Mr. Shani's appeal to be allowed, he would have to succeed on both Grounds 1 and 2. The respondents submit that both grounds are misconceived and that the appeal should be dismissed.

[25] It was submitted that the judge did not err on the issue of joinder, which involves CPR rules 19.2(3) and 19.3(1). Reference was made to the decision **In re Pablo Star Ltd**¹³ where the equivalent English rule is discussed and the court expressed the view that the rule 'is drawn in wide general terms to ensure that parties whose rights may be affected by a particular decision have a right to be heard.'¹⁴ Further, that in considering whether to add a party, the 'two lodestars are the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case and the overriding objective'.¹⁵ It was submitted that it is not necessary for the 'issue involving the new party' to be a cause of action. For that proposition, reference was made to **XYZ v Various (Including Transform Medical Group (Cs) Ltd. v Spire Healthcare Limited)**¹⁶ and **Molavi v Hibbert**.¹⁷

[26] The respondents posited that the nature of the 'connection' with the matters already in dispute is not proscribed but includes an overlap of factual evidence. Reference was made to **Molavi** supra at paragraphs 66-67, which relied on **Dunlop Haywards (DHL) Ltd. v Erinaceous Insurance Services Ltd.**¹⁸

¹³ [2018] 1 WLR 738.

¹⁴ Ibid at para. 52.

¹⁵ Ibid at para. 60.

¹⁶ [2014] EWHC 4056 (QB) at para. 22.

¹⁷ [2020] 4 WLR 46 at paras. 64 and 65.

¹⁸ [2009] EWCA Civ 354 at para. 88.

- [27] The respondents argued that the power is certainly not so confined as to require a 'pleaded issue'. On the contrary, they suggest, the authorities make clear that such a dispute may arise for the purposes of CPR rule 19.2 post-judgment. It was pointed out that there was at one time a conflict of first instance authority on the point, but that the English Court of Appeal has now resolved that conflict and found in **Prescott v Dunwoody Sports Marketing**¹⁹ that there is such a power, preferring the approach in **C Inc plc v L & Anor**,²⁰ and **The Selby Paradigm**.²¹ **C Inc plc v L & Anor** is a decision upon which the respondents place much reliance.
- [28] It is the respondents' submission that, in particular, a new party may be joined post-judgment to resolve disputes about enforcement, such as whether the claimant is entitled to enforce against assets said to be owned by the new party. In making that submission, the respondents relied on **C Inc plc v L & Anor**, where the judgment debtor (wife) asserted that she held her assets on trust for her husband. The husband was joined to the suit, and a freezing order made against him given that the wife had an arguable right to an indemnity against the husband which she or a receiver could enforce.
- [29] It was also argued that it does not matter that the issue only arose once the third party is involved. Reference was made to **In re Pablo Star**.²² It was submitted that on the facts of the instant case, the dispute arose prior to Mr. Shani's joinder, by reason of the conflict between (i) the respondents' case that Mr. Barzani beneficially owns the shares, and (ii) Mr. Barzani's denial that he did so, and/or the prima facie presumption that Mr. Shani owned them beneficially. However, the respondents argued, even if there were no dispute until Mr. Shani was joined, that would not matter.

¹⁹ [2007] 1 WLR 2343 at para. 23.

²⁰ [2001] CLC 1054 at paras. 81-83.

²¹ [2004] EWHC 1804 (Admlty) at paras. 14-17.

²² At para 51 which held that CPR r 19.2(2) ought to be given a wide interpretation so that the words "in dispute" ought to be read as "in issue" permitting the addition of a party after judgment even though, on a literal approach, there is no longer a matter in dispute.

[30] Further, it was submitted that a party may be joined even where the court could resolve all matters in dispute without joining them, where joinder is desirable because rights directly affecting the new party are being determined.²³ (Emphasis provided)

[31] The respondents contended that the judge was therefore correct to find that it was desirable to join Mr. Shani to the proceedings, without the need for a pleaded case against him. That was so for the following reasons (i) out of fairness to Mr. Shani; (ii) in order to ensure that he was bound by the determination of the beneficial ownership issue, and to avoid a disorderly dispute about whether his asserted beneficial interest took precedence over the charge; (iii) to provide a jurisdictional basis for injunctive relief and ancillary disclosure orders against him personally, in addition to the protection afforded as against the company and its share register by CPR rule 48.9, and (iv) to avoid any dispute about whether he was aware of the proprietary injunction.

Discussion and Analysis

The rules of the CPR 2000

[32] Part 19 of the CPR deals with the addition or substitution of parties. **CPR 19.2(3)** provides that the court may add a new party to proceedings if:

- (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
- (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.

[33] Part 7 of the CPR addresses service out of the jurisdiction. The four (4) gateways relied upon by the respondents are set out in CPR 7.3(2)(a), which concerns features that may arise in any type of claim; CPR 7.3(5) concerns enforcement;

²³ Re Bleinheim Leisure (Restaurants) Ltd. [2000] BCC 544 per Aldous LJ, at 570, Tuckey LJ, at 574.

CPR 7.3(7) claims about companies; and CPR 7.3(10) concerns claims under an enactment conferring jurisdiction on the court. The most relevant rule with which the issues in this appeal are concerned is CPR 7.3 (2)(a), as there is no independent challenge by Mr. Shani to the application of the other gateways referred to above. CPR 7.3.(2)(a) provides as follows:

“Features which may arise in any type of claim

(2) A claim form may be served out of the jurisdiction if a claim is made-

(a) against someone on whom the claim form has been or will be served, and

(i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and

(ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary or proper party to that claim”

[34] CPR 7.14, which is headed ‘Service of court process other than claim form’, provides as follows:

“(1) 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.

(2) The procedure by which a document specified in paragraph (1) is to be served is the same as that applicable to the service of a claim form and accordingly rules 7.8 to 7.13 apply.”

[35] Part 48 of the CPR, addresses charging orders in respect of shares and other personal property. In so far as is relevant, CPR 48.2, 48.3, 48.5 48.6 and 48.7 provide as follows:

“48.2 How to apply for charging order

(1) An application for a charging order must be made on the appropriate practice form.

(2) The application is to be made without notice but must be supported by evidence on affidavit.

...

48.3 Evidence in support of application for charging order:

- (1) This rule sets out the evidence required to support an application for a charging order.
- (2) The affidavit must-
 - (a) certify the amount remaining due under the judgment;
 - (b) identify the judgment or order to be enforced;
 - (c) state that the applicant is entitled to enforce the judgment;
 - (d) state that to the best of the deponent's information and belief the debtor is beneficially entitled to the stock or personal property as the case may be
 - (e) state the name and address of every person who is believed to be an unsecured creditor of the judgment debtor;
 - (f) state the name and address of the judgment debtor;
 - (g) where the application relates to stock-
 - (i) identify the company and the stock of that company to be charged;
 - (ii) identify any person who has responsibility for keeping a register of the stock;
 - (iii) state whether any person other than the judgment debtor is believed to have an interest in that stock whether as a beneficiary, a joint owner or trustee; and
 - (iv) if so, give the names and addresses of such persons and details of their interest; and
 - (h) in the case of any other personal property-
 - (i) identify that property; and
 - (ii) state whether any other person is believed to have an interest in the property.

[Emphasis provided]

...

48.5 Procedure for making provisional charging order

- (1) In the first instance the court must deal with an application for a charging order without a hearing and may make a provisional charging order.
- (2) On the application of the judgment creditor the court may grant an injunction to secure the provisional charging order.
- (3) An application for an injunction may be made without notice and may remain in force until 7 days after the making of an order under rule 48.8(4).

48.6 Interested persons

- (1) In this part

“interested persons” means the persons specified in paragraph (2) as well as the judgment creditor and the judgment debtor.

- (2) The interested persons are-
 - (a) any person who is responsible for keeping the register of stock for that company;
 - (b) any person who owns the stock to be charged jointly with the judgment debtor;
 - (c) any unsecured creditor;
 - (d) if the stock is held in court, the proper officer;
 - (e) the company whose stock is to be charged;
 - (f) if the stock is held by the judgment debtor as a trustee-such of the other trustees and beneficiaries as the court may direct;
 - (g) if the stock is held under a trust-the trustees or such of them as the court may direct; and
 - (h) any other person who has an interest in the personal property to be charged.

48.7 Service of provisional charging orders and of copies

- (1) If the court makes a provisional charging order, the judgment creditor must serve on the judgment debtor in accordance with Part 5-
 - (a) a copy of the affidavit in support of the application for the order; and
 - (b) the order.
- (2) The judgment creditor must also serve a copy of the order on the interested persons listed in the affidavit filed in support of the application.
- (3) Any interested person other than the company and the person responsible for keeping the register must be served personally.
- (4) The provisional charging order must state the date, time and place when the court will consider making a final charging order.
- (5) The order and copy orders must be served at least 28 days before the hearing.
- (6) The judgment creditor must file an affidavit of service not less than 7 days before the hearing.”

Joinder

- [36] At paragraphs 24 through 27 and 31 through 33 of the judgment the learned judge dealt with the joinder issues as follows:

“[24] It is correct that there is no pleaded claim against Mr Shani in the fixed date claim form and the proceedings that followed for the registration of the Award. Mr Valentin KC submitted that the absence of a pleaded case against Mr Shani in the recognition proceeding does not matter. That proceeding was completed on 30 May 2023 when the learned judge ordered the registration of the Award as a judgment of the Court. The application for a provisional charging order is for the enforcement of the judgment and the application can be made after the judgment in the main proceeding. Further, the matters in dispute in the joinder application do not have to include a cause of action against the person to be joined²⁴. The fundamental requirement is that the joinder of the new party will help to resolve the issue or issues in the proceeding.

Application after judgment

- [25] The principles and procedure for joining a new party to proceedings after judgment were considered by Aiken J in **C Inc v L & Anor**²⁵. The claimant obtained a default judgment and freezing order against the defendant (wife) who claimed to have acted as the trustee or agent of her husband who was in Guernsey. The claimant applied for the appointment of a receiver by way of equitable execution over the wife's alleged right of indemnity against her husband. The judge granted permission (after judgment) to join the husband as a defendant in the proceedings. The husband's application to set aside the joinder was refused. The court found that it had the power to join the husband in the proceedings under CPR rule 19.2 (2)(a) even though judgment had already been entered against the wife because there were still matters in dispute regarding the freezing order. Aikens J explained the principle in paragraph 83 –

"In my view the word proceedings should be given a broad interpretation in r. 19.4. It should embrace all stages of an action from the time it has been started until it becomes finally complete or moribund. There are many 'proceedings' in which a judgment is obtained but it is not satisfied. At that stage further action may be

²⁴ XYZ v Various (Transform Medical Group) (CS) Limited and others [2014] 4056 at §22.

²⁵ [2001] CLC 1054.

needed in order to enforce the judgment. The 'proceedings' have not finished at that point. A claimant may wish to appoint a receiver by way of equitable execution to get in the assets of the defendant to satisfy the judgment. Or he may wish to obtain a freezing order in aid of execution. The 'proceedings' must still be continuing in those instances. In my view the 'proceedings' against Mrs L are still continuing."

[26] The Court of Appeal in **Dunwoody Sports Marketing v Prescott**²⁶ made a similar observation:

"It has been doubted whether there is a similar power in relation to joinder under CPR r 19.2 because the power is in relation to matters in dispute in the proceedings and there are no such matters following judgment: *Kooltrade Ltd v XTS Ltd* [2002] FSR 764. In my judgment the power under CPR r 19.2 in relation to joinder and substitution *exists after judgment as well as before*: see also *C Inc p/c V L* (2001] 2 All ER (Comm) 446; *The Selby Paradigm* [2004] EWHC 1804 (Admity)."

[27] Based on these cases and the general principles relating to joinder I am satisfied that the Court has the power to join Mr Shani as a defendant in the proceedings notwithstanding that there is no claim against him in the claim form and that the application for the provisional charging order was made after the judgment was entered. These are enforcement proceedings of an order made in the main claim.

.....

[31] I am satisfied that the evidence discloses a factual basis for the Claimants' belief that Mr Barzani is beneficially entitled to an interest in the Shares. This raises a serious issue that the court will have to resolve in the charging order proceedings. This was acknowledged by the parties in the directions order dated 18 June 2024 in the 10th recital –

"**AND UPON** the parties agreeing that the question whether Mr. Barzani or Mr. Shani is the true beneficial owner of the Shares ("**the Beneficial Ownership Issue**") (with the intention the Beneficial Ownership Issue is to be determined on the pleadings in due course) and therefore the Final Charging Order Application cannot be resolved summarily."

²⁶ [2007] EWCA Civ 461 §22; [2007] 21 WLR 2343 (Practice Note).

[32] In the circumstances it is proper that Mr Shani, as the legal owner of the Shares, should be joined as a party in the proceedings so that the Court can resolve all the matters in dispute regarding the ownership of the Shares. This will allow him to resist the application and protect his interest in the Shares. It will also ensure that he is bound by the Court's determination of the beneficial ownership of the Shares.

[33] The application to set aside the order joining Mr Shani as a defendant in the proceedings is dismissed and the order is confirmed.”

[37] From the cases cited, and the evidence provided, the following principles and circumstances can readily be gleaned:

- (a) The absence of a pleaded case against Mr. Shani in the Arbitration Award Registration Proceedings did not matter: **C Inc v L**.
- (b) The matters in dispute in the joinder application do not have to include a cause of action against the person to be joined. What is required is that the issue to be determined is connected to the matters in dispute in the proceedings: **XYZ v Various (Transformation Medical Group) Limited and others**.²⁷
- (c) The word “proceedings” in the CPR is to be given a broad interpretation: **C Inc v L, In re Pablo Star and Bleinheim**.
- (d) The issue in these proceedings that still requires determination is who the true beneficial owner of the Shares is, whether it is Mr. Barzani or Mr. Shani.
- (e) The dispute arose prior to Mr. Shani’s joinder, by reason of the conflict between:
 - (i) the respondents’ case that Mr. Barzani beneficially owns the Shares; and
 - (ii) Mr. Barzani’s denial that he did so, and/or the *prima facie* presumption that Mr. Shani owned them beneficially; section 42(1) of the British Virgin Islands *Business Companies Act* provides that “*the entry of the name of a person in the register of members as a holder of a share in*

²⁷ [2014] EWHC 4056 at paras. 22 & 23.

a company is prima facie evidence that legal title in the share vests in that person.”

However, even if there were no dispute until Mr. Shani was joined, that would not matter.

- (f) A party may be joined, even where the court could resolve all matters in dispute without joining them, where joinder is desirable because rights directly affecting the new party are being determined: **Bleinheim**.²⁸ (Emphasis provided)
- (g) The issues relied upon in the evidence supporting the provisional charging order are sufficient to raise the dispute and no claim form or pleaded case is required: **C Inc v L**.
- (h) Mr. Shani is the legal owner of the shares. He also claims to be the beneficial owner of the shares. The two lodestars involving CPR 19.2(3) are the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case and the overriding objective under CPR Part 1: **In re Pablo Star**. Joining Mr. Shani ensures that he can be heard in protection of his rights and that he will be bound by the court's determination of the beneficial ownership of the shares. This will achieve the court's overriding objective and mandate of dealing with cases justly, which itself involves saving time and expense.

[38] In my opinion, the learned judge was correct in his analysis of the issues and there is no basis on which his reasoning can be faulted. Although there was no pleaded case against Mr. Shani in the original claim form, this did not preclude joinder. CPR 19.2(3) expressly allows the addition of a party where their rights may be affected by the Court's decision, even post-judgment, and enforcement proceedings are considered part of the original 'proceedings'. The learned judge's approach was also consistent with the overriding objective under CPR 1.1 which mandates dealing with cases justly and efficiently. Joinder ensures procedural fairness by allowing Mr. Shani to be heard and bound by the determination of beneficial ownership.

²⁸ Per Aldous LJ at 570 and Tuckey LJ at 574.

[39] I note that the arguments advanced by Mr. Shani attempted to criticize the relevance of the case of **C Inc v L**, classifying it as being old, decided under different procedural rules, and not widely cited. I reject those criticisms since there are other cases decided since then under the English Rules that are equivalent to those of the BVI where parties have been added after judgment had been entered and therefore being joined on the basis of evidence in enforcement proceedings of various kinds. However, **C Inc v L** was also cited with approval in the later Court of Appeal's decision of **Dunwoody Sports Marketing v Prescott** referred to by the learned judge in paragraph 26 of the Judgment.

Ground 1(2) The learned judge therefore erred in law in concluding that gateways for permission to serve Mr. Shani outside of the jurisdiction were satisfied

Appellant's Submissions on Ground1(2)

[40] Mr. Choo-Choy asserted that, as a consequence of the matters covered under Ground 1(1), the gateways in the CPR relied upon by the respondents, namely CPR 7.3(2)(a), (5), (7) and (10), to authorize service of the existing unamended claim form on Mr. Shani outside the jurisdiction, were not satisfied and therefore the respondents did not have '*a good arguable case*' that a gateway applied.

[41] Mr. Shani's position is that the BVI was not '*clearly and distinctly*' the appropriate forum for a trial against Mr. Shani, and there were no '*circumstances of the case*' in which the court ought to permit, in its discretion, service of the claim and Harb 1 on Mr. Shani outside of the jurisdiction.

[42] The fact that there was no claim pleaded in either the claim form or Harb 1 against Mr. Shani, capable of properly grounding permission from the court for service outside of the jurisdiction, means that it was therefore not '*desirable*' to join Mr. Shani to the existing proceedings.

[43] Further, Mr. Shani contended that he did not need to be added to the existing claim to '*resolve matters in dispute*' in the existing (and concluded) proceedings between the respondents and Mr. Barzani. There was also no issue involving Mr. Shani '*connected to matters in dispute*' in the existing proceedings between the respondents and Mr. Barzani that made it '*desirable*' to add him. Furthermore, even if there was an issue that made it '*desirable*' to add Mr. Shani to the existing case, it needed to be set out in a claim form and pleaded case to be capable of being served on Mr. Shani outside of the jurisdiction; otherwise, Mr. Shani would be added to a claim that could not be served on him outside of the jurisdiction.

[44] The submission advanced on Mr. Shani's behalf is that the learned judge erred when finding, by reference to issues raised in the *evidence* in support of an *application* for an interim charging order, that it was '*desirable*' to add Mr. Shani to the existing claim. The judge also erred in concluding that it was '*unnecessary*' for the respondents to need to plead a claim against Mr. Shani, as, in effect, the *evidence* supporting the *application notice* was the '*claim*' against him. It was submitted that therefore the learned judge's consequent finding that the court had the power to serve outside the jurisdiction the unamended existing claim form and the application against Mr. Shani for an interim (and final) charging order, with associated relief, was also wrong.

The Respondents' Submissions on Ground 1(2)

[45] The respondents urged the court to accept that, once the joinder point is dispensed with, Mr. Shani's jurisdictional objections fall away because the 'necessary or proper party' gateway under CPR rule 7.3(2)(a) is 'no less wide' than the Court's power to add or substitute a party under CPR rule 19.2(2). Reference was made to a number of authorities, including **AK Investments CJSC v Kyrgyz Mobil Tel Ltd.**²⁹ Thus, if it is right to join Mr. Shani as a party, this gateway applies. In any event, say the respondents, the judge found that various

²⁹ [2012] 1 WLR 1804 (UKPC) at para. 87.

other gateways applied, and there is no independent challenge to the application of those gateways on Mr. Shani's appeal.

Discussion and Analysis

[46] At paragraph 36 of the judgment, the learned judge refers to the well-known principles guiding the making of a valid service out order, and these have been set out in many cases, including **Nilon**, supra, requiring as follows:

- (a) "in relation to the foreign defendant (Mr. Shani) there is a serious issue to be tried on its merits, i.e. a substantial question of fact or law, or both;
- (b) there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context, 'good arguable case' connotes that one side has a much better argument than the other; and
- (c) in all of the circumstances the forum that is being seised [The BVI] is clearly or distinctly the appropriate forum for the trial of the dispute [the beneficial ownership of the Shares], and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."

[47] The judge (Wallbank J [Ag.]) found that all of the requirements were fulfilled and that in making the *Ex Parte Order* the judge (Webster J [Ag.]) had correctly exercised his discretion in ordering service out. This was discussed in paragraphs 34 through 48 of the judgment.

[48] On the first issue, as I have already determined, the judge correctly found that there was a serious issue to be tried involving Mr. Shani, the respondents and Mr. Barzani regarding the beneficial ownership of the shares.

[49] The second aspect of this ground has to do with the issue of the gateways, and I accept Mr. Valentin KC's submission that joinder is at the heart of Mr. Shani's complaint. If the joinder point in this appeal falls away, as I have held that it has,

then it is plain that if it was right for Mr. Shani to be joined as a party, it is clear that the 'necessary or proper' gateway under CPR 7.3(2)(a) is engaged. In my view it is particularly the description of 'proper' that is applicable in the instant case. This is because, as the learned judge discussed at paragraph 41 of the Judgment, and as also discussed in the Privy Council's decision in **AK Investment CJSC v Kyrgyz Mobil Tel**³⁰ the 'necessary or proper gateway' is 'no less wide' than the Court's power to add or substitute a party under CPR 19.2(2).

[50] At paragraph 41 of the judgment, the learned judge discussed the decision of the English Court of Appeal in **United Film Distribution Ltd. v Chhabria**,³¹ where Blackbourne J, in discussing the equivalent English provisions, commented as follows:

"[41] ...

Although the expression 'necessary or proper' party to the claim does not appear in that rule [rule 19.1(2) - joinder] it can scarcely be supposed that the court would order a person to be added or substituted as a party on the ground that it is 'desirable' to do so if that person were not either a necessary or a proper party to the claim in question. In my judgment the court's power to permit service out under what is now r. 6.20(3) (formerly Ord 11, r1(1)(c)) is no less wide than the court's wide power to add or substitute a party under r.19.1(2)."

[51] The learned judge then continued, saying:

"This is a logical statement of the position regarding service out under the necessary or proper party gateway when the court has already made an order adding the party to be served. Having found that Mr. Shani was properly joined as a defendant, and that there is a real issue that is reasonable for the court to try between the Claimants and Mr. Barzani, I have no hesitation in making a further finding that the Claimants have satisfied the requirements of the necessary or proper party gateway for service out of the claim form and other documents on Mr. Shani."

[52] In my judgment, the learned judge did not fall into error when he refused to set aside the service out aspect of the *ex parte order* and found that the gateway in

³⁰ Ibid.

³¹ [2001] EWCA Civ 416.

CPR rule 7.3(2)(a) clearly applied. His reasoning on the point is unassailable. On appeal, there was no direct challenge to any of the other gateways that the judge found applicable. It is therefore not strictly necessary to analyse the applicability of gateways any further. However, in my view, in particular, the gateway under CPR rule 7.3(10), claims under an enactment, being section 14 of the **Judgments Act 1838** (which was received in the BVI by section 7(1) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**, would have applied if the circumstances had not been covered under CPR rule 7.3.(2)(a).

[53] In my judgment, the learned judge was plainly right to find that the ‘good arguable’ case regarding gateways was made out.

[54] As to the third limb of **Nilon** *supra*, and in reaching his conclusion on the question of service out, the learned judge, at paragraphs 47 and 48, in my judgment correctly stated the matter thus in relation to forum:

“47. The third principle in **Nilon** is a short point. The application relates to property located in the Virgin Islands. It is a statutory application governed by the 1838 Judgments Act and pursued under CPR part 48. There was no serious suggestion that the BVI law is not the proper law of the application or that BVI is not clearly and distinctly the appropriate forum for the trial of the application.

48. In the circumstances, I find that the order dated 28 November 2023 granting permission to serve the claim form, the application for the charging order, and all other documents in the claim is a valid order for service of the documents on Mr. Shani outside the jurisdiction.”

[55] Mr. Shani also relied upon the Privy Council’s decision in **Broad Idea** as authority for the proposition that the ‘injunction’ gateway does not apply to a claim for ‘freestanding’ interim injunctions, in support of foreign substantive enforcement proceedings. However, I also accept the respondents’ argument that here the respondents do not rely, or need to rely, on the ‘injunction’ gateway, because

unlike in **Broad Idea**, the substantive proceedings are in this jurisdiction, and further, the injunctive relief is not freestanding.

- [56] Ground 1(2) therefore fails as in my judgment the learned judge was not in error on any of his findings on these issues.

GROUND 1(3): Accordingly, the learned judge erred in law in finding that there was a basis for a charging order application (and other ancillary relief) to be served on the Appellant outside of the jurisdiction

Appellant's Submissions on Ground 1(3)

- [57] It is well-established, the argument continued, that a notice of application cannot be served on a party outside of the jurisdiction until such time as permission to serve the claim form out of the jurisdiction has been granted separately in relation to the underlying claim, relying on the decision in **Oscar Trustee**.³²
- [58] Accordingly, in the absence of an amended claim form and pleaded case being served on Mr. Shani following permission, there was no jurisdictional or lawful basis for the respondents to serve a notice of application seeking an interim charging order, proprietary injunction, and subsequently a final charging order application on Mr. Shani outside of the territory. It was also erroneous for that notice of application and supporting evidence to form the basis for an order joining Mr. Shani to the existing proceedings or to support the case as to why the test for permission to serve out was satisfied.
- [59] Mr. Shani argued that the court is not authorized under the applicable CPR at the time (and relevant case law) to substitute *evidence in support of an application for a claim form and pleaded case* for the purposes of serving a party outside of the

³² BVIHCM2021/0022 (delivered 18th April 2024, unreported) at paras. 38, 44 and 45.

jurisdiction, or for the purposes of granting an application to add them to the existing claim.(Learned counsel's emphasis)

The Respondents' Submissions on Ground 1(3)

[60] Mr. Valentin K.C. submitted that there also cannot be any objection to the service out of the orders and applications on Mr. Shani. Once permission is granted to serve the claim form out of the jurisdiction, any other application or order may similarly be served out of the jurisdiction (CPR 7.14(1)).

Discussion and Analysis

[61] I will deal with this ground briefly. In my judgment, the learned judge was correct in finding that these aspects of the *ex parte order* were also valid, and his findings ought not to be disturbed. As the respondents set out in their written submissions, there could be no objection to the service of the orders and application on Mr. Shani. In **Oscar Trustee**,³³ upon which Mr. Shani relies, it was held that an application cannot be served out of the jurisdiction under CPR rule 7.14 unless there has been a prior order permitting service out of the claim form. However, the present case is distinguishable, because here, the claim form was served out of the jurisdiction with permission. Ground 1(3) therefore fails.

[62] For all these reasons, Ground 1 fails in its entirety.

GROUND 2: To the extent that the learned judge in the course of judgment held that in relation to a charging order personal jurisdiction does not need to be established over the party whose assets are sought to be charged and

³³ BVIHCM2021/0022 (delivered 18th April 2024, unreported).

that a final hearing can proceed without personal jurisdiction being established over that party, the learned judge erred.

Appellant's Submissions on Ground 2

- [63] At the hearing before the learned judge, the respondents submitted that if Mr. Shani was not properly joined to the claim, and permission obtained to serve the claim form and other documents outside the jurisdiction was incorrectly granted, nonetheless the provisional charging order did not need permission to be served on Mr. Shani outside of the jurisdiction. That is referred to in paragraph 49 of the judgment. It was submitted by Mr. Choo-Choy, that for the reasons already advanced, the court does not have jurisdiction to serve any other process out of the jurisdiction (such as a charging order application) unless and until a claim form has been served on that party with permission. By doing so, *in personam* jurisdiction is established over that person under which non-originating process may then be served.
- [64] It was suggested that, at paragraphs 50 to 59 of the judgment, the learned judge correctly concluded (and Mr. Shani does not dispute) that Part 48 of the CPR is not exempt from the requirements for service out contained in Part 7, and therefore permission was required to serve a charging order out of the jurisdiction.
- [65] Nevertheless, says Mr. Shani's submissions, at paragraph 60 of the judgment, the learned judge recited a submission from Mr. Valentin KC concerning whether *in personam* jurisdiction over Mr. Shani was necessary before the court could proceed with the application for a charging order application and to make a final order. In reciting learned counsel for the respondents' argument – although Mr. Choo-Choy classifies this aspect of the judgment as unclear –, Mr. Choo-Choy opined that it appears that the learned judge may have accepted the submission. Namely, that *in personam* jurisdiction was *not* required over Mr. Shani before a final charging order can be made. It was inferred by Mr. Choo-Choy that if that

was the case, then this would constitute another error of law, which would itself be inconsistent with the learned judge's earlier findings.

[66] Service of the interim charging order (and application documents), argued Mr. Choo-Choy, is a pre-requisite to making the charging order final. Further, the fact that the interim charging order establishes a proprietary right, in this case, over moveable property (shares), does not negate the requirement that service on Mr. Shani, who is outside of the jurisdiction, is required.

[67] It was argued that the proprietary right cannot be made final unless and until the application creating it has been served on the relevant parties, especially Mr. Shani, who is the registered owner of the shares. By serving those documents, correctly in accordance with the CPR out of the jurisdiction, *in personam* jurisdiction is established over Mr. Shani as owner of those shares.

[68] Once then, *in personam* jurisdiction is established over Mr. Shani having been served with due process out of the jurisdiction with permission of the Court, Mr. Choo-Choy accepts that then, if Mr. Shani decides not to participate further that would be his choice. However, learned King's Counsel insisted that jurisdiction over the third-party owner who is outside of the jurisdiction must be established first, and before the Court can make a final charging order. Finally, on this point, it was submitted that the Court therefore cannot proceed in the absence of establishing jurisdiction over Mr. Shani.

The Respondents' Submissions on Ground 2

[69] It is the respondents' position that the learned judge also did not err on this ground. It was pointed out that the Court's power to grant charging orders over shares is a statutory one and derives from section 14 of the **Judgments Act 1838**. On an application by a judgment creditor, the Court may order that shares of the judgment debtor "*shall stand charged with the Payment of the Amount for which Judgment shall have been so recovered, and Interest thereon, and such*

Order shall entitle the Judgment Creditor to all such Remedies as he would have been entitled to if such Charge had been made in his favour by the Judgment Debtor..." (The respondents' emphasis)

- [70] It was submitted that a charging order creates proprietary rights. The question, therefore, is whether the judgment debtor beneficially owns the shares, as legal ownership is neither necessary nor sufficient. Also, the proprietary nature of a charging order has many consequences, as reflected in the case law.
- [71] Further, since the order creates an interest in property, it may only attach to shares in companies within the jurisdiction. Likewise, a third-party debt order, which also operates to create a proprietary interest in the debt, can only be imposed over debts situate within the jurisdiction. That, it was submitted, is consistent with the rules of private international law that (i) property rights are governed by the *lex situs*, and (ii) foreign judgments *in rem* are only recognized where the property is situate in the country when the judgment was given.³⁴ The respondents argue that both forms of order operate *in rem* against the property, not personally against the debtor.
- [72] The respondents submit that the proprietary rights of the judgment creditor take effect subject to prior security interests in the property. Thus, where a third party later claims beneficially to own the property against which a final charging order has been made, that person is not entitled to apply to set aside the charge, but their beneficial interest (if proved) may survive it per **Drew and another v Willis**.³⁵
- [73] The respondents took the approach of explaining why Mr. Shani's argument is contradicted (or at the very least, unsupported) by CPR Part 48 and decided case law and would make no practical sense.

³⁴ Dicey, Morris & Collins on Conflict of Laws, 16th ed., rule 50, §14R.108, §25.072.

³⁵ [1898] 1 QB 450, at 453.

- [74] The respondents say that if Mr. Shani's approach were the correct procedure for dealing with an '*interested person*' situated overseas, then it is expected that CPR Part 48 would say so. But it does not. It was submitted that instead, the scheme in CPR Part 48 requires only that the judgment creditor applying for a provisional charging order identifying any '*interested person*' at any stage. Reference was made to the decision in **Cesfin Ventures LLC et anor v Al Ghaith Al Qubaisi et anor**³⁶ to make the point that service of a charging order on an '*interested person*' (CPR rule 48.7(2)) is '*essentially a notification process enabling [the interested party] (or any other creditor) to raise any objections they may have to the charging order being made final*'. If an objection is made, CPR rule 48.8(4)(b) expressly empowers the Court to give directions for a trial to resolve the objection. The respondents say that the only stated precondition to CPR rule 48.8(4)(b) is service on the judgment debtor.
- [75] The same approach, the respondents suggested, was taken at common law, before the adoption of CPR Part 48 (and its English equivalent). Reference was made to the decision of the English Court of Appeal in **Rosseel NV v Oriental Commercial and Shipping (UK) Ltd et al**³⁷ In that case, the court directed a trial of a factual dispute arising in relation to beneficial ownership, in the context of a charging order, where the individuals claiming to be the true beneficial owners were abroad.
- [76] Reference was also made by the respondents to a decision under the equivalent English rule in **British Arab Commercial Bank plc & Ors v Alghosaibi and Bros Co & Ors**,³⁸ where a trial of a beneficial ownership issue was directed, notwithstanding that the debtor was out of the jurisdiction. Mr. Valentin also referred to this Court's decision in the British Virgin Island case, **Stichting Administratiekantoor NEMS v Anna Radchenko et anor**,³⁹ where he submits a

³⁶ [2021] EWHC 3311(Ch) at para. 12.

³⁷ (1991) WL 838487 at page 7.

³⁸ [2011] EWHC 2444 (Comm) at paras. 2, 3, 14(i), and 71.

³⁹ BVIHCMAP2019/003 (delivered 29th March 2019, unreported) at paras. 13-20.

charging order was served out of the jurisdiction pursuant to Part 48 without objection.

- [77] In concluding this aspect of their submissions, the respondents say that accordingly, the judge rightly held that the Court therefore did not *need* to join Mr. Shani in order to make a final order. (Learned King's Counsel's emphasis)

Ground 2: Part 48 Discussion and Analysis

- [78] What I understand the learned judge to have found is that the court did not need to have joined Mr. Shani to the proceedings in order to make a final charging order. (Emphasis provided)

- [79] At paragraph 49 of the judgment, the judge records that the respondents' primary position was that the order granting permission to serve the claim form and other documents outside the jurisdiction on Mr. Shani was valid and he was properly joined as a defendant and served with the documents. However, the respondents' position was that even if that was not correct, their alternative position is that the court's permission was not required to serve the provisional charging order outside the jurisdiction on Mr. Shani. At paragraphs 50 to 59 of the judgment, the learned judge appears to have concluded that permission was required to serve a provisional charging order out of the jurisdiction. At paragraphs 59 and 60, the learned judge stated as follows:

"59. I do not accept Mr. Valentin's submission that a provisional charging order can be served outside the jurisdiction without permission. But that conclusion does not affect the primary position of the Claimants that they applied for and got permission to serve the claim form, the provisional charging order application and other documents in the proceedings outside the jurisdiction on Mr. Shani.

Personal jurisdiction over Mr. Shani not necessary

60. I pause here to mention an important point that Mr. Valentin KC raised. He reminded the Court that the provisional charging order created a proprietary right over the Shares. This right does not

depend on the Court having personal jurisdiction over Mr. Shani. The effect of this is that even if Mr. Shani is correct that the Court does not have personal jurisdiction over him because of service, joinder or pleading issues, the Court can still proceed with the application for the final charging order. If the Court finds in those proceedings that Mr. Barzani (the judgment debtor) has a beneficial interest in the Shares it can make the final charging order and proceed with the sale of the Shares. This will have the effect of defeating Mr. Shani's interest in the Shares. In short, the proceedings for the charging order can proceed with or without Mr. Shani's participation. CPR part 48 is a procedural fairness procedure designed to give all persons with an interest in the charged property an opportunity to attend and pursue or protect their rights."

[80] I start by referring to the words in section 245 of the **Business Companies Act** ("**BVI Companies Act**")⁴⁰ which provide as follows:

"245. Jurisdiction.

For purposes of determining matters relating to title and jurisdiction but not for the purposes of taxation, the situs of the ownership of shares, debt obligations or other securities of a company is in the Virgin Islands."

[81] It is well known that a charging order creates proprietary rights. In **BCS Corporate Acceptances Ltd. et al v Daniel Terry**,⁴¹ the judge aptly described differences between freezing injunctions, that operate *in personam*, and final charging orders, which create proprietary rights as follows:

"From those cases,⁴² the following principles can be stated:

(1) A freezing injunction operates "in personam"- it is an order directed to a defendant not to dissipate assets, for the purpose of preserving assets in aid of enforcement. It does not give the claimant any proprietary security rights over the defendant's assets or any special status as a preferred creditor of the defendant.

⁴⁰ Revised laws of the British Virgin Islands, 2014.

⁴¹ [2018] EWHC Civ 2349 (QB) at para. 47.

⁴² *Anglo Eastern Trust v Kermanshahchi* [2002] EWHC 3152 (Ch) at §§7-9; *Compagnie Noga d' Importation et d' Exportation SA v Australian and New Zealand Banking Group* [2006] EWHC 602 (Comm) at §9; *HMRC v Begum* [2010] EWHC 2186 (Ch) at §§39-41; and *Taylor v Van Dutch Marine Holding Ltd* [2017] EWHC 636 (Ch) at §§10-11.

(2) However,...the claimant may be able to achieve that status as a preferred creditor, once judgment is given, by a proprietary method of enforcement such as obtaining a charging order absolute"
(Emphasis provided)

(3) ..."

[82] Since the order creates an interest in property, it can only attach to shares in companies within the jurisdiction.⁴³ Similarly, a third party debt order, which also operates to create a proprietary interest in the debt, can only be imposed over debts situate within the jurisdiction: **Hardy Exploration & Production (India) Inc v Government of India (India Infrastructure Finance Co (UK) Ltd, third party)**.⁴⁴ This is, as the respondents argue, consistent with private international law that property rights are governed by the *lex situs*-see **Dicey**.⁴⁵

[83] At one stage, in contemplating the issues involved in Grounds 1 and 2, I considered whether it mattered that in this case the judgment debtor Mr. Barzani is not the legal owner of the shares. I also considered this in the context of whether, as Mr. Choo- Choy KC forcefully argued, this meant that there should have been a new pleaded case. As a corollary, whether the procedure adopted caused Mr. Shani to start out, unfairly, as learned King's Counsel put it, '*on the backfoot*'. However, the case law suggests that the true question and foundation for the making of charging orders is the issue of who beneficially owns the shares: legal ownership is neither necessary nor sufficient.

[84] Thus, the words '*standing in his Name in his own Right, or in the Name of any Person in Trust for him*' in section 14 of the **Judgments Act** preclude a charging order from being made against shares only owned by the judgment debtor legally but not beneficially: **Cooper v Griffin**.⁴⁶ In that case an enlightening discussion takes place concerning the fusion of the Courts of Equity and Common law. It was

⁴³ Section 14 of the Judgments Act, 1838 and to similar effect Charging Order, Act 1979 section 2(2)(b)(ii) and (iii).

⁴⁴ [2019] QB 544 at paragraphs [40], [86]-[91] and [128].

⁴⁵ Dicey, Morris & Collins on Conflict of Laws, 16th ed., §25.072.

⁴⁶ [1892] 1 QB 740, at paragraphs 743-744.

pointed out that the court must decide the matter according to all rights, legal or equitable, of the parties interested. The decision in **Bolland v Young**⁴⁷ also supports the proposition that the charging order can be made against the judgment debtor where the stocks and shares are not registered in his name. However, the plainest path to resolution of this appeal on both Grounds 1 and 2, lies in the approach taken in the case of **Rosseel** (supra), referred to by Mr. Valentin KC. It is to be noted that in **Rosseel**, the judgment debtor was not the legal owner of the shares. In a contest that is not dissimilar from that in this case, the judgment creditor's case was that although certain parties were the legal owners, the whole beneficial interest was owned by the judgment debtor. The legal owners claimed to be not only legal, but also the true beneficial owners. Although the case concerned land, the court held that there was no distinction to be drawn regarding the rules applying to stocks and shares and the directing of trial of issues. The court in that case directed a trial of a factual dispute arising in relation to beneficial ownership, in the context of a charging order, where the individuals claiming to be both the legal owners and the true beneficial owners were abroad.

[85] As the respondents correctly pointed out, in doing so, the Court expressly rejected the submission that '*where there is a factual dispute the order should be discharged and the judgment creditor left to litigate the matter in other proceedings*'.

[86] In **Rosseel**, it made no difference that the objecting party was abroad. The judge below had found that '*it would be oppressive to give them the option of either coming to be cross-examined or having, if they declined to come, inferences drawn against them*.' The judge had gone on to discharge the charging order. However, the Court, in allowing the appeal, explained that, if those individuals wished to pursue their objection to a final charging order, it was for them to do so by participating in the proceedings. In finding that there was no hardship to the

⁴⁷ [1904] KB 824.

objectors, the Court stated that *'they must come and discharge the burden upon them or take the consequences'*.⁴⁸

[87] It is to be noted that in **Rosseel**, the court spent some time discussing the then applicable English Rules (Order 50) where the judgment debtor is required to file an affidavit and amongst the matters that the affiant must state is that the interest to be charged is beneficially owned by the judgment debtor. In the CPR 48.3(2)(d) the affidavit must state that to the best of the deponent's information and belief the debtor is beneficially entitled to the stock or personal property as the case may be. CPR 48.3(2)(g) also requires that the affidavit must state whether any person other than the judgment debtor is believed to have an interest in the stock whether as a beneficiary, a joint owner or trustee. This is important because this evidence which is expressly required by the rules grounds the judgment creditor's claim for the provisional charging order and for the final charging order. The court must also examine the evidence of the party who has made an objection in order to determine what, if any, issues arise. I observe that here too, at paragraphs [28]-[31] of the judgment, the learned judge carefully analysed what issues arose, all of which are part of the fairness procedure provided for in Part 48 of the CPR.

[88] The decision under the equivalent English rule in **British Arab Commercial Bank v Algosaihi**⁴⁹ is also instructive. There a trial of a beneficial ownership issue was directed, notwithstanding that the debtor was outside of the jurisdiction.

[89] In my judgment, the learned judge was correct in deciding that it was proper to join Mr. Shani to the proceedings and that it was also desirable to do so. However, the learned Judge was also on firm ground in deciding that the court did not need to join Mr. Shani in order to make a final charging order. Having objected, as Mr. Shani has done, the court can and has given directions to resolve the objection. I accept the respondents' argument that there is nothing unjust about that.

⁴⁸ Rosseel NV v Oriental Commercial and Shipping (UK) Ltd 1991 WL 838487 (1991) at page 5.

⁴⁹ [2011] EWHC 2444 (Comm).

[90] The BVI Court has jurisdiction over the shares in a BVI company as discussed above. Further, given that Mr. Shani has chosen to hold shares in a BVI company, he should expect that those shares would be subject to the jurisdiction of the BVI Court. There is nothing oppressive about requiring a party abroad to participate in a claim if they wish to assert their claim. It is up to Mr. Shani to decide, as he has, to press an objection; that was a matter for him. That does not in any event limit the court's power to enforce its judgments by granting proprietary rights over property within its jurisdiction.

[91] However, in this case, in any event, it was not necessary to decide this point about whether personal jurisdiction over Mr. Shani was required, because there is no dispute that the *Ex Parte* Order was made permitting the claim form and the provisional order and all other relevant orders and papers to be served on Mr. Shani.

Overriding Objective

[92] The overriding objective as set out in CPR 1.1 requires the court to deal with cases justly, saving time and expense. CPR 1.2 reinforces that the court must seek to give effect to the overriding objective when it exercises any discretion given to it by the Rules or when interpreting any rule. The meaning of the Rules here considered are plain and clear in any event. All told, in my view, the learned judge's approach, and his treatment, particularly of the Part 48 rules and joinder issues in the judgment, amply demonstrate that he fulfilled the court's duty in regard to the overriding objective.

GROUND 3: The learned judge erred when making a costs order in relation to the application without having sought representations from the parties before doing so.

Appellant's Submissions on Ground 3

[93] In the court below, the learned judge ordered that Mr. Shani pay the costs of the set aside application to be assessed if not agreed. Mr. Shani's submission under this head is that it was wrong to make that order without having first heard from the parties on the principle of whether costs should be ordered, or when such costs should be agreed or assessed. It was accepted that the general rule is that costs follow the event. However, it was advanced that this is not the end of the matter and that Mr. Shani was effectively shut out of making submissions on these issues under CPR Part 65.

[94] Accordingly, had Mr. Shani had the opportunity to make submissions on costs, his position would be as follows:

- "(1) The principle of costs should not be determined unless and until it was shown by the Respondents that there was in fact a basis for joining Mr. Shani to the proceedings and that the OSI shares are held by him as trustee or nominee for Mr. Barzani. If they fail to establish that at trial then the proceedings and applications should not have been brought against him at all. They would therefore fall to be dismissed, and Mr. Shani should never have been joined. Arguably, he would then be entitled to all his costs of the proceedings, and therefore any interim costs decision in the proceedings should be reserved until then; and
- (2) He was successful on at least one part of his application and at least one other significant issue, the costs of which should have been recovered by him from the Respondents, or those costs should have been taken into account on any costs awarded to the Respondents, or those costs should have been reserved or ordered to be costs in the case".

The Respondents' Submissions on Ground 3

[95] The respondents take the position that there is no ground for interfering with the learned judge's exercise of his discretion to order that costs follow the event. They argue that there is no good reason why the costs should await the outcome of the entire proceedings. Additionally, Mr. Shani no longer asserts, on this appeal, that there was no serious issue to be tried on the facts as to whether he is a mere nominee. The only error alleged against the learned judge is an error

of law. Mr. Shani failed on those legal arguments below. The respondents therefore opine that those are therefore not points that will arise again at trial.

[96] The respondents further say that the only part of Mr. Shani's applications which succeeded concerned the freezing order, but that was discharged solely on the basis that it was duplicative of the proprietary freezing order, with liberty to reapply for the freezing order if the proprietary injunction was discharged. This therefore did not justify any departure from the usual costs order.

Ground 3 - Discussion and Analysis

[97] This Court has decided that both Grounds 1 and 2 fail. It seems to me that in those circumstances, even if at the end of the day Mr. Shani were to succeed in establishing that he is the beneficial owner of the shares, the issues that were dealt with in the court below, i.e. joinder and service and the court's jurisdiction would not arise for consideration again at the trial, or at its close. Thus, in my view, there was no reason for the judge to delay making an order for costs.

[98] This Court has carefully considered the written judgment below and submissions presented by either side. Although the learned judge did not explicitly set out reasons in relation to costs, it is plain that he followed the usual practice that costs follow the event-rule 64.6(1) of the CPR.

[99] As explained by this Court in **JTrust Asia PTE Ltd. v Mitsuji Konoshita et al**⁵⁰ an appellate court will not interfere with the exercise of a trial judge's discretion unless it is satisfied that the judge erred in principle, by either failing to take into account relevant considerations, giving too little or too much weight to relevant factors, or by taking into account irrelevant considerations. Only where

⁵⁰ BVIHCMAP2020/2022 (delivered 31st May 2021, unreported).

such error has resulted in a decision that falls outside the generous ambit within which reasonable disagreement is possible, so that the decision may properly be described as plainly wrong, will appellate interference be justified.

[100] In my judgment, the manner in which the learned judge exercised his discretion cannot be faulted. The overall outcome of the application was in the respondents' favour. Although the appellant succeeded in obtaining the discharge of the freezing order, this was ancillary and did not alter the respondents' substantive success. The judge was entitled to regard the respondents as the successful parties and to award them their costs.

[101] This ground of appeal also fails.

Disposition

[102] The appeal is therefore dismissed. The costs on the appeal and the costs in the court below, are awarded to the respondent to be assessed by a Judge of the Commercial Court or Master of the High Court, if not agreed within twenty-one (21) days of the date of delivery of this judgment.

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

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

By The Court

Chief Registrar