IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

(IN THE COMMERCIAL COURT)

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO.: BVIHC (COM) 0019 of 2018

BETWEEN

CONVOY COLLATERAL LIMITED

Applicant

-V-

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

Respondents/Defendants

Appearances:

Mr Paul McGrath QC of Essex Court Chambers and with him Mr Jonathan Addo, Ms Lucy Hannett of Harneys for the Applicant

Ms Rosalind Nicholson and Mr Murray Laing of Walkers for the First Respondent

Mr David Mumford QC of Maitland Chambers and with him Mr Justin Davis of Appleby for the Second Respondent

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2019: April 2, 3, 17

Civil Procedure-Service on foreign defendant-Jurisdiction –Injunction in aid of foreign proceedings in a foreign court -Permission to serve injunction outside the Jurisdiction-Whether court has power under Eastern Caribbean Civil Procedure Rules to authorize service on foreign defendant not subject to in personam or territorial jurisdiction of the British Virgin Islands.

At an ex parte hearing the Judge granted an injunction against the Second Respondent and gave leave to serve the Order on him outside the jurisdiction. The Second Respondent is a foreigner who was at all material times living in Hong Kong. He was not subject to the *in personam* or territorial jurisdiction of the British Virgin Islands Court but had considerable assets in the British Virgin Islands and was a director of a company in the British Virgin Islands. At the return date *inter partes* hearing the Second Respondent objected to the leave that was granted to serve him outside the jurisdiction, and applied to have the Order discharged on the ground that the Judge had no power or jurisdiction to grant such leave.

Held: Leave to service out is set aside and Order discharged. The court has no power to make orders against foreign persons outside its territorial jurisdiction and over whom it has no *in personam* jurisdiction unless authorized by statute. On its true construction there is no such power under the Eastern Caribbean Civil Procedure Rules or statute. Accordingly, the judge had no jurisdiction to grant leave and or to make the Order.

Cases applied:

AK Investment CJSC v Kyrgyz Mobil Tel Ltd
Mercedes Benz A.G. v Leiduck [1995] 3 ALL ER PC; [1996] AC
Nilon Ltd et al v Royal Westminster Investments SA et al [2015] UKPC 2
Rosler v Hilbery [1925] 1 Ch 250
Siskina v Distos Compania Naviera SA [1979] AC 210
Yukos CIS Investments Limited v Yukos Hydrocarbons Investments Limited HCVAP 2010/0028

Cases considered:

Black Swan Investment I.S.A. v Harvest View Limited BVIHCV 2009/399
Four Seasons Holding International v Brownlie [2017] UKSC 80
Goldman Sacs International v Novo Banco SA [2018] UKSC 34
Halliwel Assets Inc v Hornbeam Corporation BVIHCMAP 2015/1
Krohn GMBH v Varna Shipyard & others No 2 (1997/98) 1 OFLR
Republic of Haiti v Duvalier [1990] 1 QB 202, 2011
Solvalub Limited v Match Investments Ltd
Yachia v Levi (1998/99) 2 OFLR.

JUDGMENT

[1] Adderley J (Ag): This is the hearing on the adjourned return date to consider inter partes the *ex parte* freezing injunction and disclosure order made by Chivers, J on 9 February 2018 ("the Order").

[2] The question before the court is whether the court had power or jurisdiction to order service of a free-standing injunction in aid of foreign proceedings out of the jurisdiction on a foreign person who is not resident in the jurisdiction or otherwise subject to its *in personam* jurisdiction but has considerable assets in the BVI. It appears that this discrete question is being considered for the first time in this jurisdiction. I will not be deal with the merits of such issues as good cause of action, proper forum and risk of dissipation because it is not necessary for deciding the jurisdiction question.

THE FACTUAL BACKGROUND

[3] The Applicant, Convoy Collateral Limited ('CCL"), is a company incorporated in Hong Kong, a subsidiary of Convoy Global Holdings Ltd and part of the Convoy Global Group of companies. The Convoy Group provides financial planning, insurance, asset management, MPF and money-lending services in Hong Kong, Macau and China.

[4] Broad Idea is a company incorporated in the BVI in which Mr Cho owns 50.1% of the shares. Broad Idea holds 18.85% of the shares in Town Health International Medical Group a company incorporated in the Cayman Islands. The estimated value of Mr Cho's shareholding is HK$490,387,802.

[5] Mr Cho is a Hong Kong national resident in Hong Kong although he had fled Hong Kong for a few months after action was commenced against him in Hong Kong.

[6] On 14 February 2018 CCL filed a Writ of summons in the High Court of Hong Kong alleging that Mr Cho acted in breach of fiduciary duty and/or other duties to CCL in various respects and thereby caused CCL to suffer loss in the sum of HK$715,070,754.80 or about US$92,267,194.10.

[7] The application for the freezing order was to prevent Mr Cho from taking any steps to diminish the value of his shareholding in Broad Idea prior to judgment in the Hong Kong proceedings or otherwise taking any other steps in an attempt to make himself judgment proof by rendering enforcement in the BVI of any Hong Kong judgment more difficult.

THE PROCEDURAL BACKGROUND

[8] The question of whether this court has the right to issue and serve a free-standing injunction in aid of foreign proceedings in a foreign court against persons or entities who are subject to the court's *in personam* or other jurisdiction was answered in the affirmative by Bannister, J in Black Swan Investment I.S.A. v Harvest View Limited BVIHCV 2009/399 ("Black Swan"). The question which the court is now asked to consider is whether the court has the power to go the next step in relation to persons over whom the court has no *in personam* or other jurisdiction.

[9] In Black Swan at [9] Bannister J expressly affirmed the conclusion of the Privy Council case of Mercedes Benz A.G. v Leiduck [1995] 3 ALL ER PC; [1996] AC 284 ("Mercedes Benz"). The Second Respondent has reserved the right to argue at a higher court that based on the English House of Lord's decision in The Siskina, Black Swan was wrongly decided and should be limited to the ordering of interim relief in proceedings before it claiming substantive relief. But that is for another day.

[10] In Mercedes Benz Lord Mustill speaking for the Board of the Privy Council made this statement at p 296 H.

> "…The court has no power to make orders against persons outside the territorial jurisdiction unless authorized by statute; there is no inherent extra-territorial jurisdiction (Waterhouse v Reid [1938] 1 KB 743, at 747 per Greer LJ)."

[11] This existence of inherent jurisdiction to serve out was also later rejected by the House of Lords in Masri v Consolidated Contractors International UK Ltd [2010] 1 AC 90, at [32]. In England until the Common Law Procedure Act, 1852, there was no provision for service of a writ out of the jurisdiction. That defect was remedied by s.18 of that Act. The presumption is that the court's coercive power (including those conferred by section 24 of the Eastern Caribbean Supreme Court Virgin Islands Act Cap 80 to grant injunctions) operates territorially; that is, on those who are within the territorial jurisdiction and, exceptionally, those outside who by express statutory extension of jurisdiction, can be brought before the court.

[12] The Second Respondent says that only the issue of a claim form against the non-resident foreigner can trigger that jurisdiction. He relies on the fact that the Eastern Caribbean Supreme Court Civil

procedure Rules ("CPR") Part 7 which allows service out is concerned only with "Claim forms". CPR 7.2 commences with the following phrase: "*A claim form may be served out of the jurisdiction only if*…" He relies on the EC Court of Appeal case of Halliwel Assets Inc v Hornbeam Corporation BVIHCMAP 2015/1 at [19] where it held

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

[13] Consistent with this, CPR 7.5 provides that the applicant for permission to serve out must depose that the applicant has a claim with a reasonable prospect of success, and the order permitting service out must state the periods for acknowledgement of service and the time for filing and serving a defence.

[14] On the clear wording of the rule other documents which may be served out under CPR 7.5 must be documents in proceedings which have been initiated by a claim form.

[15] In this case no claim form has been issued and so the Second Respondent argues that the court had no jurisdiction to order service out and accordingly the permission must be set aside.

[16] Preliminarily the Second Respondent submits that no application for permission to serve Mr Cho out of the jurisdiction was in fact made. However, clearly the order was directed to him, and service was directed on him at his address in Hong Kong.

[17] That is the Second Respondent's primary point but there are other grounds.

[18] The Second Respondent relied on Dicey, Morris & Collins on the Conflict of Laws (15th ed) para 11-158 for four cardinal points that have been emphasised in the decided cases:

> "First, the court ought to be cautious in allowing process to be served on a foreigner out of England…
>
> Secondly, if there is any doubt in the construction of any heads of jurisdiction, that doubt ought to be resolved in favour of the defendant.
>
> Thirdly, since the application is without notice a full and fair disclosure of the facts ought to be made, and

Fourthly, the court will refuse permission if the case is within the letter but outside the spirit of the Rule.

[19] To that the Applicant presents counter arguments and concludes that it would be an incredible lacuna in the court's jurisdiction in the BVI's armoury to fight fraudulent conduct, if there is no jurisdiction to extend the freezing order to include Mr Cho now and protect the assets which are likely to be the only source of a viable enforcement process.

THE LAW

[20] The principles applicable to the grant of permission to serve out are conveniently summarized in the privy Council case of AK Investment CJSC v Kyrgyz Mobil Tel Ltd [2011] UKPC ("Kyrgyz Mobil").

[21] They were set out by Lord Collins at [74] and correctly summarized as follows:

(1) The claimant must satisfy the court that, in relation to the foreign defendant, there is a serious issue to be tied on the merits, that is a substantial question of fact or law, or both;

(2) Secondly, the claimant must satisfy the court that the claim falls within one or more classes of case in which permission to serve out may be given ("gateways"). In this context, "good arguable case" connotes that one side has a much better argument than the other; but where there is an issue of law as to the scope of the gateway, the Court will usually determine that one way or the other. Recently the UK Supreme Court in Four Seasons Holdings International v Browlie [2017] UKSC 80 and Goldman Sacs International v Novo Banco SA [2018] UKSC has clarified what the "much better argument test" means. At paragraph 7 of Browlie Lord Sumption explained what it means as follows:"(i) that the claimant must supply a plausible evidential basis for the application of a relevant gateway (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view o the material available if it can reliably do so but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no

reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word "much", which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."

(3) Thirdly, the claimant must satisfy the court that in all the circumstances the forum which is being seised is clearly and distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."

[22] The starting point is the statute which gives the power of the court to authorize service outside the jurisdiction. That power is included in the Eastern Caribbean Supreme Court Civil Procedure 2000 ("CPR") Part 7 headed "Service of Court Process out of the Jurisdiction". It was brought into force by Practice Direction No 4 of 2008 issued by the Chief Justice and is stated to relate to permission to serve a claim form out of the jurisdiction. There is no reference in that rule to serving a Notice of Application outside the jurisdiction, which was the originating process in this case. CPR 8.1(6)(b) provides that a person who seeks a remedy in relation to proceedings which are taking place, or will take place, in another jurisdiction must seek the remedy by an application under Part 11.

[23] Part 11 is headed "Applications for Court Orders". The powers of the court in relation to conduct of an application are set out in CPR 11.12(1). It is clear that there is no power to order service of a Notice of Application outside the jurisdiction. The only powers are set out as follows.

"11.12(1) The court may **–**

(a) issue a witness summons requiring a party or other person to attend the court on the hearing of the application;

(b) question any party or witness at the hearing; and

(c) require a party to produce documents or things at the hearing.

(2) The court may question a party or witness **–**

(a) by putting written questions and asking the witness to give written answers; or

(b) orally.

(3) Any party may then cross-examine the witness.

(4) The court may exercise any power which it might exercise at a case management conference**"**

[24] By contrast Part 7 provides gateways for service out of the jurisdiction. CPR 7.3 is headed

"Service of claim from out of the jurisdiction in specified proceedings". It provides:

7.3(2) **" (1) The court may permit a claim form to be served out of the jurisdiction if** the proceedings are listed under this Rule.

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) for an injunction ordering the defendant to do or refrain from doing **some act within the jurisdiction;..."**

[25] This is the same formulation of Hong Kong R.S.C., Ord. 11, r.1 that was construed by the Privy Council in Mercedes Benz. That read as follows:

"Provided that the writ is not a writ to which paragraph (2) of this rule applies, service of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ-

...

(b) An injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do **or the doing of that thing)"**

[26] Paragraph 2 referred to in the Hong Kong Rules relates to service of a writ out of the jurisdiction without the leave of the court which does not apply in this case

[27] Similarly, CPR 7.5 entitled "**Permission to serve claim form out of jurisdiction"** provides

"(1) An application for permission to serve out of the jurisdiction may be made without notice but must be supported by evidence on affidavit stating-

(a) the grounds on which the application was made;

(b) that in the deponent's belief the claimant has a claim with a realistic **prospect of success…"**

[28] This is the same as rule 4(1) of the Hong Kong Supreme Court Ordinance which provides:

"An application for the grant of leave under rule 1 (1) must be supported by an affidavit stating-(a) the grounds on which the application is made; (b) that **in the deponent's belief the plaintiff as a good cause of action…"**

[29] The Hong Kong Supreme Court Ordinance (cap. 4), section 21 L provided:

(1) The High Court may by order (whether interlocutory or final grant an injunction or appoint a receiver in all cases in which it appears to the High court to be just and convenient to do so. (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just. (3) the power of the high court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the high court, or otherwise dealing with assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in case where he is not domiciled or resident or **present within that jurisdiction".**

[30] The equivalent provision under BVI statute is s.24 of the West Indies Associated States Supreme Court (Virgin Islands) Act provides as follows;

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

[31] Rule 4(1) and Section 21 L of the Hong Kong Rules are, as are the BVI rules, founded on similar provisions in the English rules and provisions of s.37 of the Supreme Court Act 1981 of the United Kingdom.

[32] I provided these extracts from the jurisdictions of Hong Kong, the United Kingdom and the BVI to demonstrate that when permission to serve out was given by the judge in the case at bar, the relevant statutory framework in the BVI was materially the same as that in Hong Kong at the time Mercedes Benz was decided. Hong Kong's Order 11 was the equivalent of our Rule 7.3. Hong Kong's 'injunction' gateway was Order 11 r,1(1)(b), the BVI's is Rule 7.3(2) (b); its 'necessary or proper party' gateway was Order 11 r, 1(1)(c), the BVI's is rule 7.3 (2)(b); and its's 'enforcement' gateway was Order 11 r, 1(1)(m), the BVI's is Rule 7.3(5).

[33] In making its decision in Mercedes Benz the Privy Council at page 937 assumed facts similar to the case at bar to answer what it called the First Question, namely "Does the statutory enlargement of its territorial jurisdiction created by Order 11, r, 1(1) entitle the court to permit service of a writ or other originating process on him claiming such relief on the foreigner out of the jurisdiction, thus compelling him to choose between suffering a judgment in default or appearing before a court which has no other jurisdiction over him to argue that his assets should not be detained?. The assumed facts were (i) the foreigner was outside the jurisdiction (so no territorial jurisdiction), (ii) the claim against him has no connection with the home territory, (iii) no action against him in respect of that claim is brought or properly could be brought before the local court, (iv) he has assets in the territory, and (vi) that Mareva proceedings could have been commenced by writ or other originating process and such relief could properly be given. In other words it was assumed that (notwithstanding the Siskina) it was permissible to grant Mareva relief in support of foreign proceedings (as it now the case is in the BVI under the Black Swan jurisdiction).

[34] It is within that statutory framework with those assumptions that the majority of the Board of the Privy Council considered that the court would have no power to order the service of a form of

process limited to a claim for Mareva relief even if leave to effect such service had been sought. It just so happened that leave had not actually been sought in Mercedes Benz.

[35] A Privy Council decision on the same point of law binds all courts subject to its jurisdiction. In the circumstances the majority decision must be taken to be binding on the BVI courts.

GATEWAYS

[36] In arriving at its decision the majority analysed the gateways in the context of the rules to determine whether the court had the power to serve out. This was in contradistinction to the dissenting judgment of Lord Nicolls who, contrary to the House of Lords' decision in the Siskina, first determined that the court had the power to grant a free-standing injunction without an underlying cause of action in the jurisdiction, and then interpreted the injunction gateway to give effect to that power. In Black Swan this court also accepted, following Lord Nicolls' dissenting judgment in Mercedes Benz, and not following the decision of the Siskina, that the BVI court had the power to issue such a free-standing injunction in aid of foreign proceedings and has exercised that jurisdiction for the last 9 years. That jurisdiction has been exercised :

(1) Where the BVI court had *in personam* jurisdiction over the entity to be injuncted in the BVI, and

(2) There was good reason to believe that the defendant in the foreign proceedings owned assets in the entity that was injuncted in the BVI, which assets could be available for enforcement of any judgment that may be obtained in the foreign proceedings.

[37] Lord Nicholl's reasoning was what formed the basis of Black Swan, and Lord Nicholls concluded that the logical consequence was that if the free-standing injunction fell within the injunction gateway, the gateway could be used to serve the respondent that was not within the jurisdiction. As put by Mr McGrath QC, "*The two go hand in hand*. *You recognize that you can give this injunction and immediately it becomes obvious that there's a need now to be able to serve that injunction out of the jurisdiction*"

[38] He submitted that if one accepts Black Swan, inextricably it leads to the need for an appropriate gateway.

[39] At page 299E of the Mercedes Benz judgment Lord Mustill said this:

> "Their Lordships turn to Order 11 rule 1(b) [the injunction gateway]. At its simplest, the argument for Mercedes is that this paragraph expressly posits an injunction ordering the defendant to do or refrain from doing anything within the jurisdiction; that is exactly what a Mareva Injunction does do; and that there is no need to enquire further. In their Lordship's opinion this is not the right approach. It is not enough simply to read the words and see whether literally they are wide enough to cover the case, regard must be paid to their intent, their spirit." He made reference to Johnson v Taylor Bros. & C. Ltd A.C. 144, 153, per Viscount Haldane and G.A.F. Corporation v Amchem Products Inc. [1975] 1 Lloyd's Rep. 601, 605 per Megarry J and the cases cited.

[40] In the latter cases referred to demonstrate the need to construe rules in the context of their overall scheme.

[41] In Duvalier, Leggatt J and Staughton LJ in the English Court of Appeal, before the 'interim remedy' gateway (for applications under section 25 of the English Civil Jurisdiction and Judgments Act 1982) had been expressly provided, concluded that one would need to include a freestanding injunction through a gateway that hadn't previously been used.

[42] Mr McGrath QC made the case that this would be the natural and incremental development of the common law along the lines of the Mareva injunction which was not judge-made until 1975 and the Black Swan which was not developed in the BVI until 9 years ago, but has been adopted in the Cayman Islands and since then fortified by statute. As far as the court is aware no previous case has come before the BVI court where the defendant in the foreign proceedings against whom a Black Swan injunction was sought, was not subject to the *in personam* jurisdiction of the BVI court.

THE INJUNCTION GATEWAY-7.3(2) (b)

[43] CPR 7.3(2) provides:

> **"**7.3 (2) (1) The court may permit a claim form to be served out of the jurisdiction if the proceedings are listed under this Rule.
>
> 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) for an injunction ordering the defendant to do or refrain from doing **some act within the jurisdiction;..."**

[44] The applicant contends, as was contended in Mercedes Benz, that the reference to an "injunction" in CPR 7.3(2)(b) refers to injunction in its ordinary meaning and not an injunction sought by a claim form. He says that the claim form may be served out of the jurisdiction if a claim is made-"*for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction*"

[45] On a true construction of the wording creating the jurisdictional gateway it is evident why this gateway cannot avail the Applicant. Contrary to the contention of the Applicant, on its true construction within the context of the rule, the word "injunction" used in 7.3(2)(b) means an interlocutory injunction ancillary to a claim brought by a claim form issued to ascertain substantive rights in the jurisdiction.

[46] At page 940 Lord Mustill asked the following question:

> "… 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.
>
> "…Absent a claim based on a legal right which the defendant can be called upon to answer, of a kind falling within Order. 11, r. 1(1), the court has no right to authorize 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."

[47] At page 941 Lord Mustill stated:

> "Looking at Order 11, r. 1(1) in the round, it seems to their Lordships plain that the expression refers to a claim for substantive relief which will be the subject for adjudication in the action initiated by the writ, and not to proceedings which are merely peripheral; and what is more, peripheral to an action in a foreign court concerning issues which could not be brought before the English court under Order 11. It is true that r 9 makes Order 11 applicable to the service of an originating summons, [fixed date claim form] , but the imprint of r (1) does in their Lordships' view remain on the entire scheme of extraterritorial jurisdiction, and relates it to proceedings for substantial and not incidental relief" (square brackets added.)

[48] Their Lordships set out a number of arguments including the language of the Rule and why Order 11 was confined to originating documents which set in motion proceedings to ascertain substantive rights. They included the reference to relief claimed in "the action begun by writ" (which under the BVI rules is the reference to "claim form"), and the need for an affidavit attesting to the belief in a good cause of action. A similar affidavit is required in BVI proceedings by CPR 7.5(1).

THE NECESSARY AND PROPER PARTY GATEWAY -7.3(2)(a)

[49] This gateway is set out in CPR 7.3(2)(a) as follows:

> **"(2) A claim form may be served out of the jurisdiction if a claim is made**-
>
> (a) Against someone 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 claim"**

[50] In Nilon Ltd et al v Royal Westminster Investments SA et al [2015] UKPC 2 (Nilon) Lord Collins at [11] speaking for the Board (Lords Mance, Sumption, Carnwath and Toulson) in summarizing the

principles relating to service out set out in AK Investment CJSC v Kyrgyz Mobil Tel Ltd [2011] UKPC 7 cautioned:…

> (1) the necessary and proper party was anomalous, in that, by contrast with the other heads, it was not founded upon any territorial connection between the claim, the subject matter or the relevant action and the jurisdiction of the English courts
>
> (2) Caution must always be exercised in bringing foreign defendants within the jurisdiction under that head, and in particular it should never become the practice to bring in foreign defendants as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction.

[51] The Applicant argued that in order to make the injunction against Broad Idea effective Mr Cho is a necessary party to stop the shares from being dissipated. In response the Second Respondent stated that there is no issue between the Applicant and Broad Idea. The substance of the case is in Hong Kong (Case HCA 2922/2017) where the Conway Group is suing Mr Cho, as first defendant, and 27 others in a 93 page statement of claim for, among other things, breach of fiduciary duty, damages or equitable compensation and interest but no part of it seeks an injunction concerning acts or omissions of Mr Cho within the territorial jurisdiction of the BVI as part of its substantive relief. If the Applicant wished to obtain an injunction against Mr Cho personally it was free to apply in the Hong Kong proceedings for a worldwide freezing injunction against Mr Cho. It is common ground between the parties that worldwide freezing injunctions are obtainable in Hong Kong. Indeed the Court of Appeal in Yukos approved the procedure of seeking an injunction in the main action first. I accept the submission of the Second Respondent that there is therefore not a jurisdictional gateway available to the Applicant under this head in the BVI by which to serve Dr Cho outside the jurisdiction.

THE ENFORCEMENT GATEWAY -7.3(5)

[52] The Applicant in written submissions had relied on 'enforcement' gateway provided for in CPR 7.3(5). This provides:

> "a claim form may be served out of the jurisdiction if a claim is made to enforce any judgment or arbitral award which was made by a foreign court or **tribunal and is amenable to enforcement at common law."**

[53] However, this could only be relied out if there was an existing action (claim) against Dr Cho in the jurisdiction. There was no such claim or enforcement proceedings before the BVI court or any other court. Therefore such proceedings being taking against Broad Idea is a question which has not yet arisen. The Applicant quite rightly abandoned this ground.

Full and Frank Disclosure

[54] The Judge's attention was not drawn to the leading Privy Council decision of Mercedes Benz A.G. v Leiduck [1996] AC 94 and other authorities that absent a statutory power the local court could not grant leave to serve outside the jurisdiction a freezing order in aid of foreign proceedings against a defendant who was not subject to the courts *in personam* jurisdiction. However it cannot be said that this was deliberate; it was innocent. In those circumstances I exercise my discretion not to impose any sanctions .

EXCEPTED CASES

[55] The Applicant maintains that the editors of Dicey & Morris Conflict of Laws (15 Edn Sweet & Maxwell) [8-040] state that the English courts have left open a possible exception to freezing worldwide assets of foreigners in the case of international fraud.

[56] Several cases were brought to the court's attention where a different approach was taken. Several cases from Jersey have also taken a different view than that taken in Mercedes Benz based on what they refer to as policy grounds and having moved on since Mercedes Benz. On the "exceptional circumstances" of international fraud reference was made to Motorola Credit Corp v Ulzan (No. 2 [2003] EWCA Civ.752 and the Republic of Haiti v Duvalier [1990] 1 QB 202, 2011

where the court made an order against a non–resident defendant in support of substantive fraud proceedings in France. Staughton LJ noted in the English Court of Appeal, among other things:

> "I do not accept that argument. Since the enactment of section 25, either a claim for interim relief is itself a cause of action, or there can be proceedings and a claim for interim relief itself as a cause of action, other can be proceedings and a claim without a cause of action. What solution one chooses is merely a matter of semantics."

[57] Lord Mustill commented on this and made it clear that it did not affect the Privy Council's interpretation of the rules. Leaving aside the possibility the expression "good cause of action" could refer to claims for interim relief now empowered under the English s.25, at page 302 F he said this:

> "It is unnecessary to decide whether this is so or not, although their Lordships cannot agree with Staughton LJ, at p.211, that it is merely a matter of semantics. However this may be, in their Lordship's opinion the requirement in rule 4 [an affidavit requiring belief that the claimant has a good cause of action] read in the context of the jurisdiction created by Order 11, r. 1 can only mean a substantive right enforceable by proceedings in an English court."

[58] It should be noted that Duvalier's case was in fact not a case under the 'injunction' gateway where Ord. 11, r 1(1) (b) applied, it was a case where under the rule no leave was required to serve out. Staughton LJ noted this and declined to decide on the type of case at bar.

[59] Reference was also made to several Jersey cases including Solvalub Limited v Match Investments Ltd where the Jersey Court rejected the Siskina approach in favour of Lord Nichols' dissenting decision in Mercedes Benz. This was followed in Krohn GMBH v Varna Shipyard & others No 2 (1997/98) 1 OFLR, another Jersey case which outlined the policy underpinning such an approach which he suggested was moral principle: the court exists to administer justice and to do what is right between litigants and in so doing should be flexible. The Bailiff Sir Philip Bailhache expressly adopted the dissenting view of Lord Nicholls in Mercedes Benz where it stated:

"…a claim for a Mareva Injunction may stand alone in an action, on its own feet, as a form of relief granted in anticipation of and to protect enforcement of a judgment yet to be obtained in other proceedings. In such an action Mareva relief is not interim relief in the sense relevant for r 1(1)(b) purposes."

[60] It then went on to give examples where this view could apply such as quia timet injunctions, and duties to protect equitable rights not flowing from tort or contract even though it in aid of other proceedings.

[61] A similar view was upheld in Yachia v Levi (1998/99) 2 OFLR.

[62] What emerged from all of these cases is that there were policy reasons which drove the conclusions in circumstances where the courts were not bound to follow the majority opinion in Mercedes Benz and could make a change by common law.

CONCLUSION

[63] This area of the law is clearly amenable to differing views. The judgement of Keith J who discharged the deputy Judge's order granting leave to serve Mr Leiduck outside the jurisdiction was affirmed only by a majority of the Court of Appeal, Bokhary J.A dissenting, and, of course, the Privy Council's decision to affirm the decision of the Court of Appeal was by a majority, Lord Nicholls of Birkenhead dissenting.

[64] Nevertheless, the Privy Council in Mercedes Benz has ruled that the jurisdiction to grant an injunction for service outside the jurisdiction on a person over which the home country has no *in personam* jurisdiction only exists where it is ancillary to proceedings within the jurisdiction which have been commenced or are to be commenced to decide on substantive rights ((Siskina v Distos Compania Naviera SA [1979] AC 210 ("The Siskina")) and there are appropriate gateways that have been created by statute or the Rules in which the case falls for service out. They further

decided that even if it was legally possible to issue the Mareva injunction as main proceedings there was no jurisdiction to order service based on the Hong Kong equivalent of the BVI's existing CPR 7.3. This is binding authority on the BVI courts. I remind myself of the EC Court of Appeal's statement in Yukos CIS Investments Limited v Yukos Hydrocarbons Investments Limited HCVAP 2010/0028 (**"Yukos")** at [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 this court."

[65] There is no power to grant a free-standing injunction in aid of foreign proceedings for service outside the jurisdiction on a person who is not subject to the territorial or *in personam* jurisdiction of the BVI court.

[66] The Applicant does not purport to have any cause of action, or claim any legal right against Mr Cho personally in proceedings in the BVI. The allegations against Mr Cho in Hong Kong are totally unconnected with the BVI. As Lord Mustill speaking for the Board of the Privy Council in Mercedes Benz stated at 929 at 940:

> "…Absent a claim based on a legal right which the defendant can be called upon to answer, of a kind falling within Order. 11,r. 1(1), the court has no right to authorize 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 Order 11 is a proposed action or matter which will decide upon and give effect to rights. An application for Mareva relief is not of this character. When ruled upon it decides no rights, and calls into existence no process by which the rights will be decided."

[67] On that basis by the doctrine of *stare decisis* this court is bound to follow the decision of the Privy Council namely that the court has no power to grant a free-standing injunction for service outside the jurisdiction on a foreigner who has not submitted to the jurisdiction and is not subject to the territorial jurisdiction of the court. Even if it did the document for service out could not be brought within any of the gateways.

[68] Like so many Commonwealth countries, the constitution of the BVI provides for three independent branches of government: the Executive, the Legislature and the Judiciary. The Executive is responsible for policy, the Legislature is responsible for putting that policy into law, and the Judiciary for interpreting the laws. It is no surprise, therefore, that England and the Commonwealth countries which were cited before the court, namely The Cayman Islands, Singapore, and the Isle of Man, amended their statutes to accommodate the new policy. Jersey was the notable exception, and ostensibly they made the change by common law instead of by amendment because they are not bound by the judicial precedence of the Privy Council.

[69] Mr McGrath QC submitted that if one accepts Black Swan, inextricably it leads to the need for an appropriate gateway. He argued persuasively that the matter before the court is one of policy. While the court agrees with him, in my judgment it is not the function of the courts in a case such as this to put policy into law; that is the function of the Legislature

[70] Lord Mustill shared a similar opinion at p 943 when he said "It would merit the close attention of the rule-making body to consider whether, by an enlargement of order 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." The policy makers should give consideration to whether or not it would be in the interest of advancing the financial services sector for there to be the power of the court to order service of free-standing injunctions on foreigners who are not subject to the court's jurisdiction and, if so, provide guidelines on how that power should be exercised. At the same time they should, if considered advisable, put the Black Swan jurisdiction beyond doubt by codifying it into statute. This was the approach taken by the three jurisdictions brought to the court's attention.

[71] For all the reason set out above, I discharge the Order made by Chivers J dated 9 February 2018 in relation to Mr Cho, and set aside the leave granted to serve him with proceedings outside the jurisdiction.

[72] Costs to the Second Respondent to be assessed if not agreed.

[73] A draft of this judgment was circulated to all counsel prior to delivery, for the editorial correction of obvious slips. I wish to thank them for their input and valuable assistance to the court.

The Hon Mr Justice K. Neville Adderley
Commercial Court Judge (Ag)

By The Court

Registrar