

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2019/0026

BETWEEN:

BROAD IDEA INTERNATIONAL LIMITED

Appellant

and

CONVOY COLLATERAL LIMITED

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Paul Webster

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

Appearances:

Mr. Richard Morgan, QC for the Appellant
Mr. Paul McGrath, QC with him, Mr. Jonathan Addo and Ms. Lucy Hannett for the Respondent

2019: December 9 and 10;
2020: May 29.

Commercial appeal — Jurisdiction of High Court to grant interlocutory injunctions — Section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act — Freezing order — Whether BVI court has jurisdiction to grant a freestanding freezing order against a person against whom there is no cause of action — Whether any such jurisdiction extends to granting a freezing injunction in support of foreign proceedings to which the person is not a party — Black Swan Jurisdiction — Whether Black Swan Investment I.S.A. v Harvest View Limited et al wrongly decided — Exercise of discretion — Whether, if the learned judge had jurisdiction, he properly exercised his discretion to grant freezing order — Whether learned judge erred in finding that Chabra jurisdiction applied in the circumstances — Whether learned judge erred in finding risk of dissipation — Costs — Whether learned judge should have awarded appellant costs of respondent's application having failed to pursue relief

The appellant, Broad Idea International Limited ("Broad Idea"), is a company incorporated in the Territory of the Virgin Islands (the "BVI"). Its shareholders are Dr. Cho Kwai Chee ("Dr. Cho") and Mr. Francis Choi Chee Ming ("Mr. Choi") who hold 50.1% and 49.9% of its shares respectively. Broad Idea's sole known asset of value is its 18.85% shareholding in Town Health International Medical Group Ltd. ("Town Health"). The respondent, Convoy Collateral Limited ("Convoy"), is a company incorporated in Hong Kong. In February 2018, Convoy commenced proceedings against Dr. Cho in Hong Kong claiming damages and other relief for breach of fiduciary and other duties. Convoy also applied to the Commercial Court in the BVI for freezing orders against Broad Idea and Dr. Cho, and for permission to serve Dr. Cho outside of the jurisdiction. By its application, Convoy sought to freeze Dr. Cho and Broad Idea's assets and to restrain Broad Idea from registering certain dealings with its shares. Chivers J [Ag.] granted Convoy's application.

On 25th February 2018, Convoy made an application seeking a continuation of the freezing order against Broad Idea and Dr. Cho (the "February application"). Subsequently, Dr. Cho made an application seeking to set aside the order of Chivers J [Ag.], which was heard by another judge. In the interim, and without any further pursuit of the February application in respect of Broad Idea, Convoy made a further application seeking a freezing order against Broad Idea in support of the Hong Kong proceedings against Dr. Cho. The learned judge granted Dr. Cho's application and discharged the freezing order against him.

The freezing order against Dr. Cho having been discharged, the learned judge heard Convoy's further application for a freezing order against Broad Idea. At the hearing, Broad Idea argued that as Convoy has made no substantive claim against it in the BVI, the court had no jurisdiction to grant a freezing order against it. The judge nonetheless impliedly concluded that he had jurisdiction and continued the freezing order against Broad Idea indefinitely, having found that the Chabra jurisdiction applied in the circumstances and that Broad Idea's assets were at risk of dissipation.

Broad Idea, being dissatisfied with the decision of the learned judge, appealed. The issues which arise for this Court's determination are: (i) whether the judge had jurisdiction to grant the freezing order in circumstances where Convoy has not raised any cause of action and has not pursued any substantive proceedings against Broad Idea in the BVI or Hong Kong or anywhere else, and whether any such jurisdiction extends to granting a freezing order in support of foreign proceedings to which Broad Idea is not a party; (ii) if the judge had jurisdiction, whether he properly exercised his discretion to grant the freezing order on the basis of his findings of a risk of dissipation and that the Chabra jurisdiction applied; and (iii) whether the judge should have awarded Broad Idea the costs of Convoy's February application.

Held: allowing the appeal; and making the orders set out in paragraph 70 of the judgment, that:

Per Pereira CJ, Blenman JA and Webster JA [Ag.]:

1. It is well established that the court's jurisdiction under section 24 of the **Supreme Court Act** to grant a freezing order is based on there being a recognised cause of action which entitles the applicant to substantive relief against the defendant in the

matter. In this case, there are no allegations against Broad Idea in any claim made by Convoy, as Convoy has not filed any claim against Broad Idea either in the BVI or Hong Kong or anywhere else in the world. Convoy has only sought to freeze Broad Idea's assets as a means of safeguarding the enforcement of any money judgment it may obtain against Dr. Cho in the Hong Kong proceedings. As Convoy has no cause of action (nor has it sought to assert one) against Broad Idea itself, the learned judge had no jurisdiction to grant a freezing order against Broad Idea.

Mareva Compania Naviera SA v International Bulkcarries SA [1975] 2 Lloyd's Rep. 509, C.A. applied; **Siskina (owners of cargo lately laden on board) and others v Distos Compania Naviera SA ("The Siskina")** [1979] AC 210 applied; **Channel Tunnel Group LTD. and another v Balfour Beatty Construction Ltd. and others** [1993] AC 334 applied; **Mercedes-Benz A.G. v Leiduck** [1995] 3 All ER 929 applied; **Fourie v Le Roux and Others** [2007] 1 All ER 1087 applied; **Tassaruff Mevduati v Merrill Lynch Bank** [2011] UKPC 17 applied.

2. The majority judgment of the Privy Council in **Mercedes-Benz A.G. v Leiduck**, which this Court is bound to follow, and other persuasive decisions affirm the need for substantive proceedings before a freezing order can be properly granted.
3. The decision of **Black Swan Investment I.S.A. v Harvest View Limited et al** does not provide support for the grant of freestanding interlocutory injunctions, such as the freezing order made against Broad Idea. In so far as the learned judge in **Black Swan** relied principally on the dissenting judgment in **Mercedes-Benz**, which suggests that there need not be substantive proceedings underlying the grant of a freezing order, this was not a course of action open to him.
4. It is apparent that, in the absence of any legislative enactment giving the courts of the BVI jurisdiction to grant interlocutory injunctions in support of foreign proceedings, it was not open to the learned judge to assume such a jurisdiction. Accordingly, the courts in the BVI have no jurisdiction to grant a freestanding interlocutory injunction in aid of foreign proceedings and the learned judge in the court below erred in so far as he seemed to have relied on **Black Swan** in arriving at his decision. It is therefore clear that **Black Swan** was wrongly decided.

Mercedes-Benz A.G. v Leiduck [1995] 3 All ER 929 applied; **Willers v Joyce and another** [2017] 2 All ER page 383 applied; **Fourie v Le Roux and Others** [2007] 1 All ER 1087 considered; **Yukos Cis Investments Limited et al v Yukos Hydrocarbons Investments Limited et al** Territory of the Virgin Islands HCVAP2010/028 (delivered 26th September 2011, unreported) distinguished; **Black Swan Investment I.S.A. v Harvest View Limited et al** BVIHCV2009/0399 (delivered 23rd March 2010, unreported) disapproved.

Per Pereira CJ and Webster JA [Ag.]:

5. Even if the learned judge had jurisdiction to grant the freezing order in the

circumstances, it was not open to him to consider Broad Idea as a valid non cause of action defendant (NCAD) under the Chabra jurisdiction as there is no cause of action raised by Convoy against Dr. Cho in the BVI. There is also no sufficient basis for the conclusion that Broad Idea was merely holding assets to which Dr. Cho was beneficially entitled. Further, Convoy could not have availed itself of Chabra relief since Broad Idea's assets were not amenable to any process of execution to satisfy any judgment obtained against Dr. Cho in Hong Kong. The learned judge would therefore have been precluded from relying on the Chabra jurisdiction.

TSB Private Bank International SA v Chabra [1992] 2 All ER 245 considered; **Lakatamia Shipping Company Ltd v Nobu** [2014] EWCA Civ 636 considered; **Linsen International Ltd. v Humpuss Sea Transport PTE Ltd.** [2012] 1 BCLC 651 considered.

6. An applicant for a freezing order must provide solid evidence of a real (as opposed to fanciful) risk of dissipation. The evidence adduced by Convoy cannot be said to be solid evidence, demonstrating a real risk of dissipation. There is no doubt that Broad Idea's assets, being its shares in Town Health, are recorded as being legally and beneficially owned by it. In the absence of evidence which contradicts Broad Idea's ownership of its assets and which suggests that any judgment obtained by Convoy would be enforceable in the BVI against Broad Idea's assets, there is no basis for the learned judge's finding of a risk of dissipation. Accordingly, the learned judge would have incorrectly exercised his discretion to grant the freezing order in the circumstances, had the jurisdiction existed for him to do so.

Mitsuji Konoshita and A.P.F. Group Co. Ltd v JTrust Asia PTE Ltd. BVIHCMAP2018/0047 and BVIHCMAP2018/0020 (delivered 18th December 2018, unreported) followed; **Holyoake v Candy** [2017] EWCA Civ 92 considered; **Prest v Petrodel Resources Ltd.** [2013] 2 AC 415 considered.

Per Pereira CJ, Blenman JA and Webster JA [Ag.]:

7. As Convoy had not pursued any relief in the February application, the learned judge should have awarded Broad Idea the costs of that application.

JUDGMENT

- [1] **PEREIRA CJ:** This appeal arises from the decision of a judge of the Commercial Court by which the learned judge granted a freezing order restraining the appellant, Broad Idea International Limited ("Broad Idea"), from registering certain dealings on its share register and from diminishing its assets up to a certain value, whether located within or outside the

Territory of the Virgin Islands (the “BVI”). The appeal is principally concerned with the issue of whether the High Court in the BVI has jurisdiction to grant a freezing order where the respondent is a person against whom no cause of action is raised and against whom no substantive proceedings are pursued in the BVI, or anywhere else in the world, and whether any such jurisdiction extends to granting a freezing order in support of foreign proceedings to which that person is not a party.

Background

- [2] Broad Idea is a company incorporated in the BVI. Its directors are Dr. Cho Kwai Chee Roy (“Dr. Cho”), Mr. Francis Choi Chee Ming (“Mr. Choi”), and Mr. Kevin Cho. Broad Idea’s shareholders are Dr. Cho and Mr. Choi, who hold 50.1% and 49.9% of its shares respectively. Broad Idea’s sole known asset of value is its 18.85% shareholding in Town Health International Medical Group Ltd. (“Town Health”), a company incorporated in the Cayman Islands. The respondent, Convoy Collateral Limited (“Convoy”), is a company incorporated in Hong Kong and is a wholly owned subsidiary of Convoy Global Holdings Limited (“Convoy Global”). Convoy Global is in the business of providing financial planning and asset management services in Hong Kong, Macau, and China.
- [3] The procedural background to this appeal unfolded in the following manner. In February 2018, Convoy commenced proceedings against Dr. Cho in the High Court of Hong Kong in Action No. 399 of 2018 claiming damages and other relief for breach of fiduciary and other duties, which, it says, resulted in significant losses to Convoy.
- [4] On 2nd February 2018, Convoy applied to the Commercial Court in the BVI for freezing orders against Broad Idea and Dr. Cho, and for permission to serve Dr. Cho outside of the jurisdiction. At that time, no application for a freezing order had been made in Hong Kong against Dr. Cho.¹ By its application, Convoy sought to freeze Dr. Cho and Broad Idea’s assets and to restrain Broad Idea from registering certain dealings with its shares on its share register. On 9th February 2018, Chivers J [Ag.] granted the freezing orders

¹ An application was only issued in Hong Kong in June 2019.

sought against Broad Idea and Dr. Cho, as well as leave to serve Dr. Cho outside of the jurisdiction.

- [5] On 25th February 2018, Convoy issued and served an application seeking a continuation of the freezing order against Broad Idea and Dr. Cho. The application was adjourned repeatedly against undertakings by Broad Idea whilst a return date was arranged.
- [6] On 4th December 2018, Dr. Cho made an application seeking to set aside the order of Chivers J [Ag.] and for a declaration that the court did not have jurisdiction or should not exercise jurisdiction over him. The application was heard by another judge of the Commercial Court.
- [7] In the interim and without any further pursuit of the 25th February 2018 application in respect of Broad Idea, on 27th March 2019, Convoy issued and served a further application seeking a freezing order against Broad Idea in support of the proceedings in Hong Kong against Dr. Cho.
- [8] On 17th April 2019, the learned judge granted Dr. Cho's application and determined that the BVI court did not have jurisdiction to grant an order permitting service out of the jurisdiction of a freestanding injunction in support of foreign proceedings on Dr. Cho, as he was not subject to the territorial or personal jurisdiction of the court. The learned judge therefore set aside the order of Chivers J [Ag.] permitting service on Dr. Cho and discharged the freezing order against him.²

The Freezing Order Against Broad Idea

- [9] The freezing order against Dr. Cho having been discharged, the learned judge heard Convoy's 27th March 2019 further application seeking a freezing order against Broad Idea in support of the Hong Kong proceedings against Dr. Cho. At the inter partes hearing, Broad Idea argued that as Convoy has made no substantive claim against it or its

² An appeal by Convoy against the order setting aside the freezing order granted against Dr. Cho was the subject of a separate appeal in respect of which judgment was already delivered dismissing Convoy's appeal.

shareholders in the BVI, the court had no jurisdiction to grant a freezing order against it. Convoy contended that there is authority for the proposition that the BVI court had jurisdiction to grant the freezing order, notwithstanding that it has made no substantive claim against Broad Idea. Convoy relied on the decision of BVI court in **Black Swan Investment I.S.A. v Harvest View Limited et al**³ decided by the Commercial Division in 2010, in support of its contention. This jurisdiction has become known as “the Black Swan jurisdiction” so named after the said decision.

[10] The learned judge appears to have rejected Broad Idea’s submission that the court was not seized of jurisdiction and proceeded to determine the application on its merits. This is not surprising as the Black Swan jurisdiction, as Mr. Paul McGrath, QC on behalf of Convoy puts it, has been the law in the BVI for the past 10 years and was hailed by the common law world as a welcome development. By an order made on 30th July 2019 for which written reasons were given on 27th August 2019, the learned judge granted a freezing order against Broad Idea indefinitely, restraining it from:

- (1) In any way disposing of, dealing with or diminishing the value of any of its assets up a value of US\$75,583,490.03 whether they are within or outside the BVI.
- (2) Effecting or allowing to be effected any changes, transfers, variations, notations or amendments to Broad Idea’s share register in respect of the legal or beneficial ownership of any of its share.
- (3) Registering, causing to be registered or causing any change in the legal or beneficial ownership of the shares of Broad Idea in any way.
- (4) In any way recognising or recording or causing to be recognised or recorded on the register of its shares any charge or transfer of the ownership of all or part of the equitable interest in the shares, including

³ BVIHCV2009/0399 (delivered 23rd March 2010, unreported).

but not limited by way of encumbrance, pledge, lien or charge over the shares.

- (5) Removing, or allowing or instructing or causing to be removed, or instructing the removal of, the share certificates pertaining to the shares or the original register from the BVI; and
- (6) Cancelling the shares and/or reissuing the shares, or issuing any new shares or entering into any oral or written agreements, commitments or the like for the issue of new shares in addition to those shares recorded on the register as at 9th February 2018 to either existing shareholders or third parties.

[11] The nub of the learned judge's analysis is recorded at paragraphs 34 to 38 and 44 of the judgment where he stated as follows:

"[34] The causes of action in Hong Kong against Mr. Cho and his associates are for breach of statutory duties, unlawful means conspiracy, lawful means conspiracy, dishonest assistance, fraud and misappropriation of assets giving rise to loss and damages in the sum of HK\$715,070,754.80 or about US\$92,267,194.10. As it relates to Mr. Francis Choi the causes of action include facilitating Mr. Cho and his associates in their alleged wrongdoing in material ways recognized under BVI law. All are capable of resulting in money judgments by way of damages which would be enforceable in the BVI by various enforcement means against the shares in Broad Idea including appointment of a receiver by way of equitable execution and sale, or a charging order and sale.

...
[36] In this case Broad Idea has been made a defendant in the BVI case. In addition, in his affidavit dated 28 November 2018, Francis Choi attests to Mr. Cho's control over Broad Idea. On the independent evidence so far the court accepts that there is a good arguable case that Broad Idea is a money box and both Mr. Cho and Francis Choi are equally involved in the operation and management of its underlying investment in the shares of Town Health. Among other things this is recognized by Town Health's treatment of Broad Idea's shareholding as being owned by Mr. Cho and Francis Choi. In its Director's Report to its Interim Report, dated 30 June 2018, it disclosed that the 18.85% of its shareholding as it was at that time,

was being held by directors Mr. Cho and Francis Choi by a controlled corporation, namely Broad Idea. I accept the submission of Convoy that the Chabra Jurisdiction applies. Although the shares in Town Health were suspended from public trading with effect from 27 November 2017, it is still operating, independent appointments have been put in place to facilitate the resumption of trading and the shares have considerable value with an estimated market capitalization of HK\$5,193,000,000.00. Mr. Cho and Francis Choi who continue to be on the board of Town Health as of 31 March 2017 claim 18.85% of that through Broad Idea's shareholding in Town Health.

- [37] Even if the argument advanced on behalf of Broad Idea that the shares were legally and beneficially owned by it is correct, in order for the shares in Broad Idea to maintain their value it is necessary to restrain the disposal of the Town Health shares as well. This has nothing to do with piercing the corporate veil as advanced by the Respondent.
- [38] As to Broad Idea being only a money-box of Mr. Cho, Mr. Francis Choi denies this. However, this must be viewed against the objective evidence of actions carried out. He himself stated in his evidence that Mr. Cho controlled Broad Idea and that he was a passive shareholder.
- ...
- [44] Despite the fact that Convoy did not first seek a freezing order in the primary jurisdiction where the action was taking place, Hong Kong, as is expressed by the Court of Appeal in **Yukos** as ordinarily the expected route, on the facts of this case at the time the relief [sought] in the BVI was the only practical and effective means available to Convoy to ensure meaningful enforcement. At that time it was the only unencumbered asset of Mr. Cho known to Convoy. As submitted by Convoy, in practical terms the injunction will cause minimal disruption to Broad Idea which is a non-trading company and its shareholders Mr. Cho and Francis Choi."

The Appeal

- [12] Broad Idea, being dissatisfied with the learned judge's decision, filed a notice of appeal containing some 17 grounds of appeal. It is unnecessary for the purposes of this judgment to reproduce them. The essence of Broad Idea's first complaint is that the learned judge had no jurisdiction pursuant to section 24 of the **Eastern Caribbean**

Supreme Court (Virgin Islands) Act⁴ (the “**Supreme Court Act**”) to grant a freezing order against Broad Idea in circumstances where Convoy has not raised any cause of action against Broad Idea and has not pursued any substantive proceedings against it in the BVI or anywhere else, and also where there has been no extension of the court’s jurisdiction under section 24 of the **Supreme Court Act** to empower it to grant a freezing order in aid of foreign proceedings. Alternatively, Broad Idea submits that if the learned judge had jurisdiction, he wrongly exercised his discretion to grant the freezing order as there was no sufficient evidence establishing a risk of dissipation, and that the learned judge erred in finding that the Chabra jurisdiction applied in the circumstances. Broad Idea also complains that, Convoy having not pursued any relief in its 25th February 2018 application, the learned judge should have awarded it the costs of that application.

Issues

- [13] At the heart of this appeal is the issue of whether the learned judge had jurisdiction to grant the freezing order against Broad Idea, in the circumstances where Convoy has not raised any cause of action and has not pursued any substantive proceedings against Broad Idea in the BVI or Hong Kong or anywhere else, and whether any such jurisdiction extends to granting a freezing order in support of foreign proceedings to which Broad Idea is not a party (“the Jurisdiction issue”). Assuming that the learned judge had jurisdiction, the issue of whether he properly exercised his discretion to grant the freezing order arises for determination (“the Exercise issue”). The remaining issue is whether the learned judge should have awarded Broad Idea the costs of Convoy’s 25th February 2018 application.

The Jurisdiction Issue

- [14] There is no dispute that the BVI court has personal or territorial jurisdiction over Broad Idea, since Broad Idea is a company incorporated in the BVI. This appeal is concerned with whether the court has subject matter jurisdiction to grant, in aid of

⁴ Cap 80, Revised Laws of the Virgin Islands 1991.

foreign proceedings, a freezing order against a person resident in the BVI against whom no substantive proceedings have been pursued anywhere in the world.

- [15] A useful starting point is to examine the source of the High Court's jurisdiction to grant interlocutory injunctive relief. The High Court's jurisdiction to grant such relief derives from section 24(1) of the **Supreme Court Act** which provides that:

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

It is clear that the High Court's jurisdiction to grant interlocutory injunctive relief derives from statute, and not the common law.

- [16] The ambit of the High Court's jurisdiction to grant interlocutory injunctions, has been the subject of a long line of judicial pronouncements. Beginning with the decision of the English Court of Appeal in **Mareva Compania Naviera SA v International Bulkcarries SA**⁵ Lord Denning MR explained the court's power to grant an injunction in the form of a freezing order in the following way:

“The court will not grant an injunction to protect a person who has no legal or equitable right whatever. That appears from *North London Railway Co v Great Northern Railway Co*. But, subject to that qualification, the statute gives a wide general power to the courts. It is well summarised in Halsbury's Laws of England:

‘... now, therefore, whenever a right, which can be asserted either at law or in equity, does exist, then, whatever the previous practice may have been, the Court is enabled by virtue of this provision, in a proper case, to grant an injunction to protect that right.’ (emphasis mine)

- [17] Following the decision in **Mareva**, the House of Lords in **Siskina (owners of cargo lately laden on board) and others v Distos Compania Naviera SA**⁶ (“the Siskina”) considered the scope of the court's jurisdiction to grant interlocutory injunctions such

⁵ [1975] 2 Lloyd's Rep. 509, C.A.

⁶ [1979] AC 210 at p.256.

as freezing orders. Though not binding on the courts of the Eastern Caribbean, **the Siskina** is often cited and consistently applied as the starting point in any discussion on the court's power to grant such injunctions. Lord Diplock, who delivered the opinion of the House of Lords, explained the court's power to grant interlocutory injunctions thus:

"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. **It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.** It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.

Since the transfer to the Supreme Court of Judicature of all the jurisdiction previously exercised by the court of chancery and the courts of common law, the power of the High Court to grant interlocutory injunctions has been regulated by statute. That the High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment, was first laid down in the classic judgment of Cotton L.J. in *North London Railway Co. v Great Northern Railway Co.* (1883) 11 Q.B.D. 30, 39-40, which has been consistently followed ever since." (emphasis mine)

- [18] It is made plain by the judgment of Lord Diplock that an interlocutory injunction is ancillary to the assertion of some legal or equitable right and that the court granting the injunction must first have jurisdiction to enforce the asserted legal or equitable right by final judgment. What is critical from Lord Diplock's interpretation of section 45(1) of the UK Supreme Court of Judicature (Consolidation) Act 1925, which is similar in effect to section 24 of the **Supreme Court Act**, is that the existence of a cause of action is a prerequisite for the grant of an interlocutory injunction. In reference to section 45(1), Lord Diplock stated:

"That sub-section, speaking as it does of interlocutory orders, presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary. **This factor has been present in all previous cases in which Mareva injunctions have been granted.**" (emphasis mine)

- [19] Subsequent decisions of the House of Lords, applying **the Siskina**, support the view that the court's power to grant an interlocutory injunction is based on the existence of a cause of action recognised by English law. This much is borne out from the decision of **Channel Tunnel Group Ltd. and another v Balfour Beatty Construction Ltd. and others**⁷ where Lord Browne-Wilkinson stated that:

“Even applying the test laid down by *the Siskina* the court has power to grant interlocutory relief **based on a cause of action recognised by English law against a defendant duly served...**” (emphasis mine)

The above statement of Lord Browne-Wilkinson not only reaffirms that the court's power to grant an interlocutory injunction is based on there being a recognised cause of action, but also states in unambiguous terms that such a cause of action would be one against the duly served defendant in the matter.

- [20] The House of Lords' decision in **the Siskina** was applied by the Privy Council in **Mercedes-Benz A.G. v Leiduck**,⁸ which was recognised by this Court in **Yukos Cis Investments Limited et al v Yukos Hydrocarbons Investments Limited et al**⁹ as being binding on the courts of the BVI. In **Mercedes-Benz**, the claimant filed a claim in Monaco against the defendant who owned assets in Hong Kong, namely shares in a Hong Kong company. In order to guarantee the enforceability of any judgment obtained in Monaco, the claimant applied for a worldwide freezing injunction in Hong Kong to restrain the defendant and the Hong Kong company from dealing with any of their assets which included the shares. A deputy judge granted the claimant permission to serve the claim on the defendant outside the jurisdiction and a worldwide freezing injunction. The defendant applied to set aside the deputy judge's orders. A judge granted the defendant's application and set aside the deputy judge's orders. The claimant appealed the judge's decision to the Court of Appeal. The Court of Appeal dismissed the appeal. The claimant thereafter appealed to the Privy Council. On appeal to the Privy Council, Lord Mustill observed that:

⁷ [1993] AC 334.

⁸ [1995] 3 All ER 929.

⁹ Territory of the Virgin Islands HCVAP2010/028 (delivered 26th September 2011, unreported).

“...Their Lordships are far from convinced that it is permissible to issue an originating process claiming only Mareva relief, even against a defendant present within the jurisdiction, rather than to proceed by summons or motion in an existing action or one which the applicant undertakes to commence as a condition of obtaining an order. For if the defendant fails to appear to the writ the plaintiff is entitled to judgment in default for the relief claimed, and there is something strange about a final judgment for a Mareva injunction; a remedy which, as is well established, embodies no adjudication by the court on the rights of the parties and takes effect only until such an adjudication has taken place in other proceedings.” (emphasis mine)

[21] The observations of Lord Mustill in **Mercedes-Benz** were echoed by Lord Scott in the House of Lords decision of **Fourie v Le Roux and Others**¹⁰ where His Lordship explained the need for substantive proceedings or an undertaking to commence substantive proceedings before an interlocutory injunction could be properly granted. I consider the following pronouncement of Lord Scott at paragraph 32 of **Fourie** to be apposite:

“...without the issue of substantive proceedings or an undertaking to do so, the propriety of the grant of an interlocutory injunction would be difficult to defend. An interlocutory injunction, like any other interim order, is intended to be of temporary duration, dependent on the institution and progress of some proceedings for substantive relief.”

[22] It is clear that the authorities, from **Mareva** to **the Siskina** and leading up to the decisions of the Privy Council in **Mercedes-Benz** and the House of Lords in **Fourie**, all support the proposition that, for the court’s jurisdiction under section 24 of the **Supreme Court Act** to be properly invoked, there must be an enforceable cause of action against a defendant which the court has jurisdiction to enforce by final judgment, and that cause of action must be raised in substantive proceedings or an undertaking must be given to commence such proceedings.

[23] Mr. Morgan, QC, on behalf of Broad Idea, in his arguments before this Court, made the point that no originating process had been issued against Broad Idea and referred to rule 8.1(6) of the **Civil Procedure Rules 2000** (“CPR”) which allows a party who seeks

¹⁰ [2007] 1 All ER 1087.

a remedy (a) before proceedings have been started or (b) in relation to proceedings which are taking place, or will take place in another jurisdiction, to use a Part 11 form of application. He also referenced CPR rule 17.2(5) which requires a claimant who seeks and is granted an interim remedy before issuing a claim, to undertake to issue and serve a claim form by a specified date. Mr. Morgan, QC, argued that at this interlocutory stage, a party will only need to show an arguable case and the actual merits would be left over to trial. Here, however, there will never be a trial of any sort at any time in which Broad Idea will have the opportunity to test Convoy's evidence as there is no cause of action or right or claim of any kind asserted against Broad Idea. In essence, there can never be a final judgment against Broad Idea.

- [24] Convoy has sought to justify its use of the CPR Part 11 form of application by reference to CPR rule 8.1(6)(b) which speaks to seeking a remedy in relation to proceedings which are taking place, or will take place in another jurisdiction. To my mind, this is too broad a construction to place on this provision of the CPR on the facts of this case. There are no proceedings taking place or which will be taking place in respect of which Broad Idea is or will be a party in another jurisdiction and Convoy cannot therefore avail itself of the procedure in CPR rule 8.1(6). Indeed, there are no allegations against Broad Idea in any claim made by Convoy, as Convoy has not filed any claim against Broad Idea either in the BVI or Hong Kong or indeed anywhere else in the world. As stated earlier, Convoy commenced proceedings in Hong Kong against Dr. Cho claiming damages and other relief for breach of fiduciary and other duties. Convoy has only sought to freeze Broad Idea's assets as a means of safeguarding the enforcement of any money judgment it may obtain against Dr. Cho at the conclusion of the Hong Kong proceedings. It is useful to highlight at this juncture that Dr. Cho only holds 50.1% of the shares in Broad Idea and no suggestion has been made that Broad Idea and Dr. Cho are one and the same. Any relief awarded to Convoy at the conclusion of the Hong Kong proceedings would therefore not be enforceable against Broad Idea itself, but perhaps only against Dr. Cho's shareholding in Broad Idea. What is critical is that Convoy has no cause of action (nor has it sought to assert one) against Broad Idea as a legal entity.

[25] There being no enforceable cause of action against Broad Idea, it is unsurprising that Convoy has not sought to commence substantive proceedings against Broad Idea, whether in the BVI or in Hong Kong. It is equally unsurprising that Convoy had not given an undertaking to the BVI court to commence substantive proceedings against Broad Idea at the time of applying for the freezing order. In my view, the absence of an enforceable cause of action giving rise to actual or potential substantive proceedings against Broad Idea falls short of the requirements, outlined in **the Siskina** and subsequent decisions, for the grant of interlocutory injunctions such as freezing orders.

The Black Swan Jurisdiction

[26] Mr. Paul McGrath, QC on behalf of Convoy contended that, notwithstanding the principles emanating from **the Siskina**, the decision of **Black Swan** provides authority for the contention that the learned judge had jurisdiction to grant a freezing order against Broad Idea, though no substantive proceedings were commenced against it. It is thus necessary to consider the decision of **Black Swan**.

[27] In **Black Swan**, the indebtedness of a company called Hyundai Motor Distributors Limited was assigned to the claimant company, Black Swan Investment ISA ("Black Swan Investment"). Black Swan Investment applied to the High Court of South Africa for an order that an individual called Mr. Rautenbach be made personally liable for the fraudulent management of the indebted company. Thereafter, Black Swan Investment applied to the BVI court for a freezing order in aid of the South African proceedings against Mr. Rautenbach, seeking to restrain two BVI registered companies alleged to be under his ownership or control. In **Black Swan**, like in the case at bar, the BVI companies against whom a freezing order was granted were not parties to foreign proceedings nor were substantive proceedings filed against them in the BVI. The factual circumstances of **Black Swan** are therefore on all fours with that of this appeal.

[28] In determining whether the court could grant a freezing order in the circumstances, the learned judge considered **Mercedez Benz** and **Fourie**. At paragraphs 7 and 8 of **Black Swan**, the judge stated:

“[7] In **Mercedes Benz** Lord Mustill, giving the opinion of the majority, [held] that in the absence of an equivalent to section 25 of the UK Civil Jurisdiction and Judgments Act 1982 (‘section 25’) the Hong Kong court had no jurisdiction to grant a freezing order against a foreign defendant not subject to the jurisdiction of the Hong Kong court in aid of proceedings being prosecuted against that defendant in Monaco, left open the question whether such relief could have been granted had the defendant been present in Hong Kong. But he indicated that, where the proposed defendant was already subject to the territorial jurisdiction of the court, the approach of Lord Nicholls, in his dissenting judgment, might, if the question fell to be decided in a future case, prevail. But that is not the same as a ruling that it would, so that the question...was left open in Mercedes Benz.

[8] In *Fourie v Le Roux* Lord Scott held that the passage from Lord Browne-Wilkinson’s speech in *Channel Tunnel*...taken together with other authorities...showed that the English court does have jurisdiction, in the strict sense, to make an order in aid of a prospective judgment to be obtained in foreign proceedings, provided that the person restrained is subject to the in personam jurisdiction of the English court. Lord Scott went on to say that had such an injunction been granted following the *Siskina* decision, the party enjoined could have argued that although such an order was within the strict jurisdiction of the English court to make it, it fell outside the broad jurisdiction and ought not to have been granted, because such injunctions should not be granted otherwise than in support of proceedings being prosecuted in England. Lord Scott confined himself to saying that ‘in 1977’ freezing injunctions were in their infancy and that at that date the House might have agreed with the objection. He went on to say that in England the argument would now fail because of the passage of section 25. But he left open the question what would be the answer today in the absence of a provision equivalent to section 25 was once more left open.”

[29] From the above statements of Lord Mustill in **Mercedez-Benz** and Lord Scott in **Fourie**, the learned judge formed the view that a lacuna in the law existed, which he had the power to fill. He stated:

“[9] ...There is also high authority (*Mercedes Benz*, *Fourie v Le Roux*) that the question whether a freezing order should be granted in aid of foreign proceedings against a defendant who is subject to the court’s

jurisdiction is open – in other words, that that question is not decided by the Siskina, which was not dealing with that set of facts.”

- [30] The learned judge then concluded that the BVI court had jurisdiction to grant a freezing order against the two defendant BVI companies, against whom no cause of action was raised nor any substantive proceedings pursued, in aid of the proceedings in South Africa against Mr. Rautenbach. In arriving at that conclusion, he relied principally on the dissenting judgment of Lord Nicholls in **Mercedes-Benz** which he considered to be ‘compelling’ and which he, curiously, preferred to the majority judgment. At paragraph 11 of **Black Swan**, the learned judge stated that:

“...the reasoning of Lord Nicholls in Mercedes Benz is compelling. It is described by the learned editors of Dicey, Morris & Collins as ‘powerful’. Lord Nicholls points out that freezing orders are unlike ‘ordinary’ interlocutory injunctions, because they bear no relation to the subject matter of the proceedings. Their only purpose is to prevent dissipation of assets available to satisfy a money judgment. In particular, Lord Nicholls held that they do not depend upon there being a pre-existing cause of action. Moreover, [t]here is no logical distinction between the grant of such relief in aid of a domestic money judgment and a grant in aid of a foreign one, unless the foreign judgment is such that the domestic court would decline to enforce it...Lord Nicholls points out that there is no reason in principle why [a] writ should not be issued claiming only relief ancillary to a foreign award and that the courts are already familiar with such ‘stand alone’ writs- for example in anti-suit claims and in proceedings for Norwich Pharmacal orders and he says (and I respectfully agree) that Channel Tunnel is authority for the proposition that such a writ may be issued.”

- [31] After concluding as he did, the learned judge went on to describe the policy reasons underpinning the **Black Swan** jurisdiction thus:

“[15] ...quite apart from the jurisdictional analysis of Lord Nicholls which I have respectfully adopted, there are sound policy reasons why important offshore financial centres, such as Jersey and the BVI, should be in a position to grant such orders in aid where necessary. The business of companies registered within such jurisdictions is invariably transacted abroad and disputes between parties who own them and others are often resolved abroad. It seems to me that when a party to such a dispute is seeking a money judgment against someone with assets within this jurisdiction, it would be highly detrimental to its reputation if potential foreign judgment creditors were to be told that they could not, if successful, have resort to such assets unless they were to commence substantive proceedings here

in circumstances where, in all probability, they would be unable to obtain permission to serve them abroad- thus presenting them with an effective brick wall or double bind of the sort so deplored by Lord Nicholls in *Mercedes-Benz*.”

[32] Mr. Richard Morgan, QC on behalf of Broad Idea took issue with the learned judge’s reasoning in **Black Swan**. First, he argued that in so far as the learned judge relied on the dissenting judgment of Lord Nicholls in **Mercedes-Benz**, that was not a course open to him. Second, Mr. Morgan, QC contended that the BVI court’s jurisdiction under section 24 of the **Supreme Court Act** does not extend to granting injunctions in support of foreign proceedings as such enabling legislation, similar to the UK Civil Jurisdiction and Judgments Act 1982,¹¹ has not been enacted in the BVI.

[33] Mr. Morgan, QC also relied on the Privy Council decision in **Tassaruff Mevduati v Merrill Lynch Bank and Trust Company Limited and others**¹² in which Lord Collins, in essence confirmed that section 37 of the Senior Courts Act, (the successor to section 25 of the 1873 Act) did not confer an unfettered power as has been distilled by the authorities such as **the Siskina**, **Channel Tunnel** and **Mercedes-Benz** from the highest courts in England as well as for the BVI. Mr. McGrath, QC on the other hand argued that the law and indeed BVI law has moved on since **the Siskina** and to depart from **Black Swan** would, in essence, be retrogressive. He also urged the Court to adopt the approach taken by the Jersey courts which have not followed **the Siskina** line of cases. It is important to bear in mind however, that Jersey, unlike BVI, may not be properly regarded as a common law jurisdiction. Indeed, the Royal Court of Jersey considered itself to be free to depart from **the Siskina** line of cases because Jersey’s law is based more on French law rather than the common law of England and as such Jersey is not bound by the doctrine of stare decisis which is a principle of English common law.¹³ This observation (with which I agree) was recently made in the judgment of Webster JA [Ag.] of this Court in the related appeal, **Convoy Collateral Ltd v Broad Idea International Limited and Cho Kwai Chee**.¹⁴

¹¹ 1982 c. 27.

¹² [2011] 4 All ER 704.

¹³ See: *The State of Qatar v Sheik Khalifa Bin Hamad-Al-Thani* [1999] JLR 194.

¹⁴ BVIHC VAP 2016/0030 delivered 30th March 2020 (unreported).

[34] This challenge, the first of its kind since the decision in **Black Swan**, puts squarely in issue the question whether it was open to the court, without legislative intervention, to assume the **Black Swan** jurisdiction.

[35] In the Eastern Caribbean, as in many jurisdictions with a common law legal system, the principle of stare decisis or the doctrine of precedent is a fundamental pillar. The principle is essentially that lower courts are bound to follow the decisions of higher courts. The principle is aptly explained by Lord Neuberger in **Willers v Joyce and another**¹⁵ in the following way:

“In a common law system, where the law is in some areas made, and the law is in virtually all areas developed, by judges, the doctrine of precedent, or as it is sometimes known stare decisis, is fundamental. Decisions on points of law by more senior courts have to be accepted by more junior courts. Otherwise, the law becomes anarchic, and it loses coherence clarity and predictability.”

At first blush, it is passing strange that the learned judge in **Black Swan** relied principally on the dissenting judgment of Lord Nicholls in **Mercedes-Benz** in arriving at his conclusion. To my mind, there is no doubt that the majority judgment of Lord Mustill contains the *ratio decidendi* of the decision of the Privy Council, which is the highest court of the BVI. In so far as the learned judge preferred the dissenting judgment of Lord Nicholls to the majority judgment, and relied on it in arriving at his decision, I am constrained to hold that although the policy reasons are well understood, this was not a course of action open to him.

[36] Although the Privy Council in **Mercedez-Benz** addressed the separate issue of whether there was jurisdiction to order service of a claim seeking a freezing order against a foreign defendant not subject to the personal jurisdiction of the Hong Kong court, Lord Mustill went on to state the following in relation to a defendant subject to the personal jurisdiction of the Hong Kong court:

“...It may well be that in some future case where there is undoubted personal jurisdiction over the defendant but no substantive proceedings are

¹⁵ [2017] 2 All ER 383 at para. 4.

brought against him in the court, be it in Hong Kong or England, possessing such jurisdiction, an attempt will be made to obtain *Mareva* relief in support of a claim pursued in a foreign court. If the considerations fully explored in the dissenting judgment of Lord Nicholls of Birkenhead were then to prevail a situation would exist in which the availability of relief otherwise considered permissible and expedient would depend upon the susceptibility of the defendant to personal service. Their Lordships believe that it would merit the close attention of the rule-making body to consider whether, by an enlargement of Order 11 Rule 1(1), a result could be achieved which for the reasons already stated is not open on the present form of the Rule.” (underlining supplied)

It is apparent that the learned judge in **Black Swan** understood Lord Mustill to be stating that once the defendant was resident within the jurisdiction, that it was open to the court possessing such personal jurisdiction to grant a freezing order against that defendant in the absence of substantive proceedings. I am not in agreement with such an interpretation.

[37] In my view, there is nothing in Lord Mustill’s judgment which suggests that a freezing order could be granted where no substantive proceedings have been pursued against the person restrained, even where there is undoubted personal jurisdiction. What Lord Mustill stated was that in some future action the court may be faced with circumstances ‘where there is undoubted personal jurisdiction over the **defendant** but no substantive proceedings are brought against him in **the court...possessing such jurisdiction**’ (emphasis mine). I do not consider Lord Mustill to be referring to a situation mirroring the circumstances of **Black Swan** and indeed of the case at bar, where Convoy has not pursued any substantive proceedings against Broad Idea anywhere in the world. The above statement of Lord Mustill therefore ought not to be interpreted as dispensing with the requirement, recognised by the House of Lords in **the Siskina** and in subsequent decisions, for an underlying cause of action pursued in substantive proceedings to exist before the court can properly grant a freestanding interlocutory injunction albeit one in the nature of a freezing order.

[38] The learned judge’s conclusion in **Black Swan** was also based on his interpretation of the judgment of Lord Browne-Wilkinson in **Channel Tunnel**. To my mind, the learned

judge did not properly contextualise the findings in **Channel Tunnel** in order to properly apply them to the circumstances of **Black Swan**. At page 669 of **Channel Tunnel**, Lord Browne-Wilkinson stated as follows:

“Even applying the test laid down by The Siskina the court has the power to grant interlocutory relief **based on a cause of action recognized by English law against a defendant duly served** where such relief is ancillary to a final order whether to be granted by the English court or by some other court or arbitral body.” (emphasis mine)

As I have expressed above, Lord Browne-Wilkinson’s statement makes it plain that the court’s jurisdiction to grant a freezing order is based on there being a recognised cause of action against the duly served defendant in the matter. In short, there must be a recognised cause of action against the defendant in this jurisdiction against which a final judgment can be rendered. Such an interpretation aligns with the factual circumstances which existed in **Channel Tunnel**, where the parties against whom an injunction was sought were the same parties against whom the enforceable cause of action arose. Those however, were not the circumstances of **Black Swan**, and neither are those the circumstances of this appeal.

[39] It is useful at this juncture to address Mr. Morgan’s submission that the court’s jurisdiction under section 24 of the **Supreme Court Act** does not extend to granting injunctions in support of foreign proceedings as such enabling legislation, similar to the UK Civil Jurisdiction and Judgments Act 1982, has not been enacted in the BVI. He contended that, in other common law jurisdictions, the legislature has made express statutory provisions to empower courts to grant injunctions in support of foreign proceedings and as the BVI Legislature has not given the court such power, its jurisdiction does not extend to protecting the process of foreign courts in this manner.

[40] It is indeed common ground that no provision similar to section 25 of the UK Civil Jurisdiction and Judgments Act 1982 exists in the BVI. The question is therefore, whether the BVI court has jurisdiction to grant a freezing order in support of foreign proceedings where no enabling legislation has been enacted. On this point, I consider the pronouncements of Lord Scott in **Fourie** to be apposite. In **Fourie**, the House of

Lords observed that the court had jurisdiction, in the strict sense, to grant an interlocutory injunction where it had in personam jurisdiction over the person against whom the injunction was sought and that the court now had the power to grant interim relief in relation to proceedings that had been or were about to be commenced in a foreign state. However, to my mind, the House of Lords in **Fourie** arrived at that conclusion on the basis of section 25 of the UK Civil Jurisdiction and Judgments Act 1982. At paragraphs 30 and 31 of **Fourie**, Lord Scott stated:

“In *The Siskina* the jurisdiction of the court over the defendant depended upon the ability of the plaintiff to obtain leave to serve the defendant out of the jurisdiction. Once the leave that had been granted had been set aside there was no jurisdictional basis on which the grant of the injunction could be sustained. On the other hand, if the leave had been upheld, or if the defendant had submitted to the jurisdiction, it would still have been open to the defendant to argue that the grant of a *Mareva* injunction in aid of the foreign proceedings in Cyprus was impermissible, not on strict jurisdictional grounds, but because such injunctions should not be granted otherwise than as ancillary to substantive proceedings in England.

Whatever might have been the impact if that point had been raised in 1977 it would, today, fail. **The effect of section 25 of the Civil Jurisdiction and Judgments Act 1982**, as extended by the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/302), **is to enable the High Court “to grant interim relief” in relation to “proceedings” that have been or are about to be commenced in a foreign state**, for example, South Africa. The consequence of this, in relation to the present case, is in my opinion to settle the question of jurisdiction, in its strict sense.” (emphasis mine)

The ineluctable inference from Lord Scott’s statement is that the English High Court had no jurisdiction to grant such relief prior to the enactment of the Civil Jurisdiction and Judgments Act 1982.

- [41] In addition to the United Kingdom, the Legislature in the Cayman Islands has empowered the Cayman Islands Grand Court to grant interlocutory injunctions in support of foreign proceedings by enacting section 11A of the Cayman Islands Grand Court Law (2015 Revision).¹⁶ Section 11A, the marginal note of which states ‘Interim

¹⁶ Law 8 of 1975 consolidated with Laws 28 of 1977, 1 of 1981, 12 of 1985, 7 of 1987, 31 of 2005, 17 of 2007, 15 of 2014 and with the Grand Court Law (Amendment) Order, 1995.

relief in the absence of substantive proceedings in the Islands' provides that:

“11A. (1) The Court may by order appoint a receiver or grant other interim relief in relation to proceedings which-

(a) have been or are to be commenced in a court outside of the Islands; and

(b) are capable of giving rise to a judgment which may be enforced in the Islands under any Law or at common law.”

[42] It is also of significance that the BVI Legislature, by virtue of section 43(2) of the **Arbitration Act, 2013**¹⁷ (the “Arbitration Act”), has expressly empowered the court to grant interim relief in aid of foreign arbitration proceedings. This was recognised by Blenman JA in **Koshigi Limited and Svoboda Corporation v Donna Union Foundation**.¹⁸ It follows that prior to section 43, the court had no jurisdiction to grant such relief in relation to foreign arbitration proceedings. In my view, if the court already had jurisdiction to grant interlocutory injunctions in support of foreign proceedings at common law, the very necessity for those enactments would be called into question.

[43] Taking Lord Scott’s observations in **Fourie** into consideration, it is apparent that in those jurisdictions where the court has jurisdiction to grant an interlocutory injunction in support of foreign proceedings, such a jurisdiction has been legislated by Parliament. I note that section 24 of the **Supreme Court Act**, which clothes the court with the jurisdiction to grant interlocutory injunctions, makes no reference to the grant of injunctions in aid of foreign proceedings. Further, pre-1982 English authorities such as **the Siskina** suggest that interlocutory injunctions should not be granted otherwise than as ancillary to substantive proceedings in the BVI. There is therefore no common law basis for the grant of such injunctions apart from **Black Swan**. In my view, the jurisdiction to grant such interlocutory injunctions must be one which arises as a result of an enactment.

[44] Having regard to my conclusion that the jurisdiction to grant interlocutory injunctions in support of foreign proceedings is a statutory one, and there being no provision

¹⁷ Act No. 13 of 2013.

¹⁸ BVIHCVMAP2018/0043 and 0050 (delivered 17th January 2019, unreported).

equivalent to section 25 of the UK Civil Jurisdiction and Judgments Act 1982 enacted in the BVI, or section 11A of the Cayman Islands Grand Court Law (2015 Revision) or indeed section 43(2) of the BVI Arbitration Act, I am of the view that the BVI court has no jurisdiction, absent statutory authority, to grant interlocutory injunctions in aid of litigation in a foreign country. The learned judge in **Black Swan** presumably, was alive to the effect of there being no equivalent to section 25 in the BVI but apparently preferred the dissenting judgment of Lord Nicholls in **Mercedes-Benz** and in so doing considered that the apparently obvious jurisdictional gap (if I may call it that) should and could be filled by assuming the jurisdiction.

[45] As I have alluded to earlier, as well intended as that ‘filling of the jurisdictional gap’ may have been, given the historical statutory jurisdiction underpinning the grant of such interlocutory relief, I am of the view that it was not open to the learned judge to assume such jurisdiction in the absence of legislative enactment. It is normally accepted that extensions of the common law or, put another way, what the common law is, derives its force from the highest court in England. This is so in respect of the BVI by virtue of the **Common Law (Declaration of Application) Act**¹⁹ enacted in the Virgin Islands in 1705. I am therefore driven to the conclusion that **Black Swan** was wrongly decided. The perceived gap is one to be filled by the BVI Legislature and not by the court. It is obvious that the BVI Legislature saw it fit to make a provision in the Arbitration Act empowering the court to grant such interim measures in respect of foreign arbitrations and should be able to address this lacuna as it relates to foreign court proceedings by enacting the required provisions with minimal difficulty.

[46] It is not sufficient however to conclude that **Black Swan** was incorrectly decided in resolution of the Jurisdiction issue. Convoy has submitted that **Black Swan** has been applied within the BVI for nearly ten years and was upheld on appeal in the case of **Yukos**. As a decision emanating from this Court, it is necessary to address the impact of **Yukos** on the present appeal.

¹⁹ Act No. 31 of 1705.

[47] Indeed, the Court of Appeal is bound to follow its own decisions except in certain circumstances. This principle has long been established since the English Court of Appeal decision of **Young v Bristol Aeroplane Co. Ltd.**²⁰ In his judgment in **Young v Bristol** Lord Greene MR stated the following:

“On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exception to this rule (two of them apparent only) are those already mentioned which for convenience we here summarize: (1.) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2.) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3.) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam.”

On this basis, it must be determined whether **Yukos** is binding upon this Court in so far as the decision has assumed the **Black Swan** jurisdiction.

[48] To my mind, **Yukos** did not involve a direct challenge (as is the case here) to the **Black Swan** jurisdiction, but simply dealt with the issue of whether the claimant may obtain a foreign judgment which may be enforceable by whatever means against the local assets owned or controlled by the defendant.²¹ In **Yukos**, the appellants sought to regain control over the respondent companies and that was the extent of the relief sought by them in the Netherlands. Such a relief had no need of the type of security which a freezing order provides for its enforcement to be made possible. The focus in **Yukos** was therefore on the issue of whether the judge in the lower court was correct to refuse the grant of a freezing order in circumstances where the foreign cause of action did not give rise to potential enforcement proceedings against the respondents' assets in the BVI. In **Yukos**, the existence of the **Black Swan** jurisdiction was merely assumed in order to ventilate the central issue. **Yukos** therefore ought not to be read as upholding or confirming the jurisdiction. In other words, as the source of the **Black Swan** jurisdiction was not in issue, any pronouncements in **Yukos** affirming its existence can only be regarded as obiter.

²⁰ [1944] KB 718.

²¹ Territory of the Virgin Islands HCVAP2010/028 (delivered 26th September 2011, unreported), paragraph 147.

- [49] It follows that the decision in **Yukos** is not binding on this Court in so far as it assumed the existence of the Black Swan jurisdiction. As the existence of the jurisdiction is being challenged for the first time on this appeal, this Court is at liberty to render its view on **Black Swan**.
- [50] I therefore conclude, as undesirable as it may be perceived in modern day international commerce, that the courts of the BVI, though having in personam jurisdiction over Broad Idea, being a BVI registered company, have no subject matter jurisdiction to grant a free standing interlocutory injunction against it in aid of foreign proceedings, there being no statutory basis for the exercise of such a jurisdiction. It is for the Legislature of the BVI to step in and clothe the court with such authority.
- [51] For completeness, I propose to also address the learned judge's conclusions that the Chabra jurisdiction applied in the circumstances, and that Broad Idea's assets were at risk of dissipation, based on his finding that Broad Idea is a mere money box for assets beneficially owned by Dr. Cho and Mr. Choi.
- [52] Before addressing the Chabra jurisdiction however, I think it necessary to make an observation in respect of what I consider to be an irregularity occurring in the proceedings as it relates to Mr. Choi.
- [53] Interestingly, and in my view regrettably, evidence filed late and in support of yet another amended application filed by Convoy on 21st June 2019, and not served until almost the eve of the hearing was utilised by the learned judge to draw adverse inferences against Mr. Choi and then was relied upon by him to grant the freezing order in broad terms against Broad Idea and the entirety of its assets which in turn effectively froze Mr. Choi's interest as well. This was without Mr. Choi having an opportunity to address the allegations, and in circumstances where Mr. Choi was not a party to the proceedings and had no claims made against him in BVI. This was done with reference to another earlier set of proceedings in Hong Kong in action No. 2922 of

2017 which proceedings were not the basis for the Black Swan relief sought in BVI. The learned judge appears to have been aware of this in that at paragraph 33 of his judgment he refers to the Hong Kong action No. 2922 of 2017 and noted that Mr. Choi was added to those proceedings as the 40th defendant as a facilitator. The learned judge then had this to say: 'The court took this into consideration although it is still open to the Respondent (Broad Idea) to challenge the effect of this at a later date'. It is not apparent to me on what later date this would be open to challenge by Broad Idea as the hearing in which the learned judge was engaged was the inter-parties hearing of the freezing order application which had been earlier made. To my mind, this was procedurally unfair and ought not to have entered into the learned judge's deliberation let alone have reliance placed thereon for the grant of an overbroad freezing injunction.

The Exercise issue - The Chabra Jurisdiction

[54] This is a short point. In arriving at the conclusion that it was appropriate to grant the freezing order against Broad Idea, the learned judge made clear, at paragraphs 35 and 36 of his judgment referred to above, that Broad Idea qualified as a Chabra defendant.

[55] The Chabra jurisdiction refers to the principle emanating from **TSB Private Bank International SA v Chabra**²² where if a claimant could establish a good arguable case that assets apparently owned by a third party were in fact beneficially owned by the defendant against whom there was a cause of action, the claimant could obtain a freezing injunction against the third party. In his oral submissions, Mr. Morgan, QC quite succinctly particularised the circumstances which frame the parameters of the **Chabra** jurisdiction as follows:

- (a) The court is to be seized of substantive proceedings against the primary defendant;

²² [1992] 2 All ER 245.

- (b) The court, being seized of the substantive proceedings, has granted or is in the process of granting a freezing order against the primary defendant;
- (c) The court must be persuaded that the evidence shows good reason to suppose that a third party is acting as an agent or nominee of the primary defendant or has assets which would be amenable to some process of execution to satisfy an eventual judgment. Observation of the existence of a separate corporate personality continues;
- (d) There must be evidence before the court that the assets of the third party are at risk of dissipation;
- (e) The court is able to join the third party to the substantive proceedings to perfect its jurisdiction as against the third party as a non cause of action defendant ("NCAD"). The joinder allows the court to undertake the ultimate resolution of both the substantive merits and the merits of the allegations of the third party being a mere nominee or agent of the primary defendant; and
- (f) Having joined the third party the court may determine the issue of the ownership of the third party's assets before determining the substantive merits, but being seized of the substantive merits the court is bound to allow a final determination of the substantive issue.

[56] To reiterate, it is undisputed that Convoy has raised no cause of action against Dr. Cho in the BVI. It was therefore not open to the learned judge to consider Broad Idea as a valid NCAD in circumstances where there is no cause of action raised against Dr. Cho in the BVI. It follows that the BVI court was not seized of any substantive proceedings involving a primary defendant to which Broad Idea could have been 'added' as a **Chabra** defendant.

[57] Further, the learned judge ought to have been satisfied on the evidence that Broad Idea was acting as a mere nominee for Dr. Cho. In **Lakatamia Shipping Company**

Ltd v Nobu²³ Rix LJ explained that “...if a claimant wishes to freeze company assets of a non-defendant, he must either be prepared to make a sufficient case that the company concerned is just a money-box of the defendant and holds assets to which the defendant is beneficially entitled, and/or it has to make that company a defendant itself under the Chabra jurisdiction”. In my view, the evidence could not properly support such a conclusion. The evidence as to the legal and beneficial ownership of the shares held by Broad Idea in Town Health was not controverted. Neither was the legal and beneficial ownership of Broad Idea’s shareholding as being held in the proportions, as earlier stated, by Dr. Cho and Mr. Choi. Further, the statement by Mr. Choi in his evidence in the court below to the effect that he was essentially a passive shareholder in Broad Idea and left its management to Dr. Cho did not provide a sufficient basis, in view of the other evidence, for the conclusion that Broad Idea was merely holding assets to which Dr. Cho was beneficially entitled.

- [58] In addition, the decision in **Linsen International Ltd. v Humpuss Sea Transport PTE Ltd.**²⁴ makes it clear that in order for Convoy to avail itself of **Chabra** relief, Broad Idea’s assets must first be amenable to some process of execution to satisfy any judgment obtained by Convoy against Dr. Cho. For reasons which shall be explained later in this judgment, that precondition to **Chabra** relief cannot be satisfied. In the premises, the learned judge would therefore have been precluded from relying on the **Chabra** jurisdiction as a basis for granting the freezing order against Broad Idea.

The Exercise issue - Risk of dissipation

- [59] This brings me to consider whether the learned judge properly concluded, based on the evidence, that Broad Idea’s assets were at risk of dissipation. It is well settled that an applicant for a freezing order must provide solid evidence of a real (as opposed to fanciful) risk of dissipation. Evidence which merely shows a possibility of a risk of dissipation or is speculative is insufficient.²⁵ In **Mitsuji Konoshita and A.P.F. Group**

²³ [2014] EWCA Civ 636.

²⁴ [2012] 1 BCLC 651.

²⁵ See: *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H. UND Co. K.G. (the ‘Niedersachsen’)*

Co. Ltd v JTrust Asia PTE Ltd.,²⁶ Thom JA stated that the test of whether there is a real risk of dissipation of assets is, as stated by Gloster LJ in **Holyoake and another v Candy and others**, thus:

“There was some debate as to what was the correct test to establish that there was a risk of dissipation such as to make it just and convenient to grant a conventional freezing injunction. However, the threshold in relation to conventional freezing orders is well established. There must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. But it is not every risk of a judgment being unsatisfied which can justify freezing order relief. Solid evidence will be required to support a conclusion that relief is justified, although precisely what that entails in any given case will necessarily vary according to the individual circumstances.”²⁷

[60] On this point, Mr. Morgan, QC submitted that the fact that Dr. Cho has substantial control over assets which are held by Broad Idea is likely to be of critical importance to the question whether there is a real risk that the assets will be dissipated or otherwise put beyond Convoy’s reach. However, he stated that, the existence of substantial control is not, of itself, enough. It is necessary that the court be satisfied that there is good reason to suppose either: (i) that Dr. Cho can be compelled (through some process of enforcement) to cause Broad Idea to use its assets to satisfy any possible judgment; or (ii) there is some other process of enforcement by which Convoy can obtain recourse to the assets held by Broad Idea. There is great force in Mr. Morgan’s submission.

[61] In finding that there was a risk of dissipation, the learned judge considered that the evidence showed a good arguable case that Broad Idea is a money box of Dr. Cho’s investment in the shares of Town Health. There is no indication in the judgment of how the learned judge arrived at that conclusion as he gave no adequate analysis of the evidence and thereby gave no adequate explanation for his conclusion that Broad Idea held its assets as a nominee or beneficially for Dr. Cho. Further, there appeared to be no arguments advanced by Convoy nor evidence sufficient for the learned judge to find that the assets of Broad Idea were somehow also the assets of Dr. Cho.

²⁶ BVIHCMAP2018/0047 and BVIHCMAP2018/0020 (delivered 18th December 2018, unreported).

²⁷ [2017] EWCA Civ 92.

Indeed, the assets of Broad Idea, being its shares in Town Health, are recorded as being legally and beneficially owned by it. No evidence was adduced showing that the shares in Town Health held by Broad Idea were divided up, ascribing different portions to Dr. Cho and Mr. Choi. There is also no evidence that Broad Idea's assets have been misapplied or that Broad Idea is being operated in a manner contrary to BVI law. In the absence of any evidence which contradicts Broad Idea's legal and beneficial ownership of its assets, recorded in the public records of Town Health in Hong Kong, the learned judge's finding that Broad Idea is a money box of Dr. Cho and therefore that there is a risk of dissipation, cannot stand. I am also satisfied that the evidence adduced by Convoy cannot be said to be evidence, let alone solid evidence, demonstrating a real risk of dissipation. On that basis alone, and assuming the court had jurisdiction to grant a freezing order of the sort prayed for, it ought to have been refused.

[62] For completeness, and the court having been furnished by both sides with the judgment of the Hong Kong court in respect of Convoy's application for freezing orders against Dr. Cho, it is worth mentioning that the Hong Kong court (accepted as the primary jurisdiction of the dispute) has dismissed Convoy's application for freezing orders against Dr. Cho having found that no risk of dissipation had been established.²⁸ It could hardly then be arguable that a freezing order can be maintained against Broad Idea based, as it must be, on an underlying risk of dissipation on the part of the real defendant Dr. Cho, which has been found in the primary jurisdiction not to have been made out on the evidence. This would provide yet another reason for the refusal of such relief were there jurisdiction to grant it.

[63] With there being no sufficient evidence to suggest that Broad Idea's assets and Dr. Cho's assets are one and the same in order for Dr. Cho to assert control over Broad Idea's assets, the matter of whether some other process of execution in satisfaction of a judgment would be available against Broad Idea's assets is called into question. On this point, Mr. Morgan, QC argued that the circumstances in **Yukos** are similar to

²⁸ See paras. 35 and 36 of the Hong Kong judgment dated 11th March 2020 in HCA399/2018.

those in the present appeal, in that, any judgment secured by Convoy in Hong Kong would be against Dr. Cho and therefore would not be enforceable against Broad Idea. In his oral submissions Mr. Morgan, QC referred the Court to paragraph 139 of **Yukos**, where Kawaley JA [Ag.] stated:

“Establishing justice and convenience will ordinarily require, at a minimum, **proof of a good arguable case that the applicant will obtain a judgment which will be enforceable (whether by registration, recognition or otherwise) by the local court against the local defendant.**” (emphasis mine)

[64] There appears to be no reason to suggest that any judgment which may be obtained by Convoy would be enforceable in the BVI against Broad Idea or its assets. The decision of the Supreme Court of the United Kingdom in **Prest v Petrodel Resources Ltd.**²⁹ makes it plain that the only circumstances in which the assets of a company can be looked to in satisfaction of a claim against a defendant are if those assets are held by the company merely as a nominee or beneficially for the defendant. For the reasons earlier stated, those are not the circumstances of this case. Hypothetically, if Convoy were awarded a money judgment against Dr. Cho in Hong Kong, it could possibly obtain a charging order over his shares in Broad Idea and then apply for an order for sale of those shares to satisfy the judgment. However, in those circumstances, Convoy could not compel the conduct of Broad Idea’s affairs unless it became a shareholder of Broad Idea in place of Dr. Cho. Still, were Convoy to become a shareholder in Broad Idea it would only be able to petition for Broad Idea’s winding up in its capacity as shareholder, not as a judgment creditor as no claim in respect of the judgment debt could ever attach to Broad Idea itself as a distinct legal person. Therefore, at the highest, enforcement could only be in respect of Dr. Cho’s shares in Broad Idea.

[65] It is worth mentioning that in **Yukos**, Kawaley JA [Ag.] cast doubt, in light of fundamental principles of company law, on whether a freezing order could be properly granted in circumstances (as in this case) where there can be no enforcement of a

²⁹ [2013] 2 AC 415.

judgment in the BVI against the assets of the 'local defendant'. At paragraphs 149 and 150 of **Yukos**, Kawaley JA [Ag.] observed that:

"[149]...it is difficult to envisage circumstances in which such relief would be available in the absence of the ability of the claimant to either (a) enforce the relevant foreign judgment against the third parties' assets, or (b) assert a local cause of action likely to result in a local judgment enforceable against third parties to the foreign litigation who are within the territorial jurisdiction of the local court. A more flexible approach to freezing injunctions would potentially ride a coach and horses through fundamental notions of separate corporate legal personality. It would also potentially justify routine interference with the right of companies indirectly connected with shareholder disputes involving their affiliates, to freely control their assets.

[150] Moreover, it is a fundamental principle of British-based company law that a company's management is not only entitled but also legally obliged to operate on the assumption that the duly registered shareholders are the owners of the shares. If a dispute about the ultimate or intermediate ownership of a company's shares was itself sufficient to justify freezing a company's assets pending the resolution of the dispute at the instance of a prospective alternative ultimate or intermediate owner, the vital business activities of operating subsidiaries would all too frequently grind to a halt."

[66] I consider the observations of Kawaley JA [Ag.] to be apposite and I endorse them. Indeed, the notion of separate corporate legal personality is a fundamental feature of English company law and is the cornerstone of the corporate commercial landscape in the BVI. The grant of freezing orders in cases where there is no possibility of a judgment being enforced against the local defendant would potentially render the company's separate corporate legal personality meaningless and, generally speaking, would too frequently grind the vital operating activities of companies to a halt by restraining the use of their own assets, often (as in this case) as a result of a dispute concerning a single shareholder in his or her personal capacity. To my mind, such an approach to freezing orders engenders undesirable results and cannot peacefully coexist with the well-established notion of separate legal personality and the policy considerations underpinning the company law of the BVI.

[67] Accordingly, for the reasons stated above, the learned judge failed to distinguish between the legal personality of Broad Idea and that of Dr. Cho and could not properly have found that the assets of Broad Idea were available to satisfy any judgment against Dr. Cho. It follows that the learned judge could not properly have found that there was any risk that Broad Idea could or would take any steps to dissipate its own assets so as to avoid a judgment against Dr. Cho, which was, in any event, not enforceable against Broad Idea's assets.

[68] I am therefore of the considered view that, in any event, the learned judge would have incorrectly exercised his discretion to grant the freezing order in the circumstances, had the jurisdiction existed for him to do so.

Costs on Convoy's 25th February 2018 Application

[69] I now propose to address Broad Idea's complaint that the learned judge should have awarded it the costs of the 25th February 2018 application, Convoy having not pursued any relief on that application. On this issue, I agree with Broad Idea's submission. In my view, Convoy had effectively withdrawn the 25th February application when it issued the 27th March 2019 application against Broad Idea. Further, Broad Idea would surely have incurred costs in responding to the 25th February application and as a consequence of having its counsel appear at several adjourned hearings of the application. Broad Idea is therefore entitled to its costs.

Conclusion

[70] In the premises, I would therefore make the following orders:

- (1) The appeal against the order of the learned judge is allowed;
- (2) The freezing order made against Broad Idea on 30th July 2019 is set aside;
- (3) Broad Idea is entitled to its costs on Convoy's 25th February 2018 application, such costs to be assessed by the court below if not agreed within 21 days;

- (4) Having prevailed on the appeal, Broad Idea is entitled to its costs in the court below to be assessed by the court below, if not agreed within 21 days;
- (5) Convoy shall bear Broad Idea's costs in this appeal in an amount to be assessed which shall be no more than two-thirds of the assessed costs in the court below; and
- (6) There shall be an enquiry in the Commercial Court, within 30 days of the date of this judgment, as to whether Broad Idea has suffered any damage as a result of the freezing order.

[71] I am grateful to learned counsel for their detailed submissions, both written and oral, which were of much assistance.

[72] **BLENNAN JA:** I have read the judgment of the learned Chief Justice Dame Janice M. Pereira, and I am in complete agreement with her reasoning and conclusions. However, given the importance of the issues that have been raised in this appeal, it is incumbent to share my views.

Issues on Appeal

[73] The principal issues that arise for determination by this Court can be helpfully crystallised thus:

- (a) Whether in the absence of statutory provisions, it is possible for the Court to grant a freezing injunction against a person against whom there is no cause of action in any part of the world;
- (b) If so, whether the jurisdiction extends to granting a freezing injunction in support of foreign proceedings to which the person is not a party; and
- (c) Even if this is so, whether the learned judge properly exercised his discretion in granting the freezing injunction.

Background

- [74] The learned judge granted a freezing injunction against Broad Idea. Being aggrieved by this decision, Broad Idea has appealed.
- [75] In addressing the above issues, I adopt the very helpful and clear background as stated in paragraphs 2 - 11 of the Chief Justice's judgment so as not to lengthen this judgment unnecessarily.

Broad Idea's Submissions

- [76] Learned Queen's Counsel, Mr. Richard Morgan, submitted that the gravamen of Broad Idea's contention is that the learned judge was wrong to grant interlocutory relief to Convoy, when the latter made no substantive claim against Broad Idea in the BVI, has made no allegations entitling it to any final relief against Broad Idea or its assets anywhere in the world, either now or at any time in the future, and where Broad Idea is not a party to substantive proceedings brought by Convoy anywhere in the world.
- [77] Mr. Morgan, QC contended that in any event, whether or not there were any foreign proceedings against Broad Idea, the learned judge simply had no power under section 24 of the **Supreme Court Act** to grant any injunction in support of foreign proceedings. This, he reiterated, is for two reasons. First, the power given to the court under section 24 does not extend to protecting the process of foreign courts. Second, by being free to deal with its own assets as it is entitled to do, Broad Idea is not threatening to interfere with any court process or act in a way that is inconsistent with any eventual judgment. He maintained that in circumstances where Convoy did not, and cannot now, assert any legal or equitable right against Broad Idea, the power conferred on the court by virtue of section 24 of the **Supreme Court Act** was not available and the learned judge erred in making a freezing order against Broad Idea.

[78] Mr. Morgan, QC submitted that the judgment in **Black Swan** was based on the dissenting judgment of Lord Nicholls in **Mercedes-Benz**, and that dissenting judgment has not subsequently been followed at the Privy Council or Supreme Court level. He also submitted that the judgment relied on a narrow reading of **Fourie v Le Roux** devoid of the context of the rest of the ratio. He maintained that both the judges in **Black Swan** and in the court below should have considered themselves bound by the majority judgment in **Mercedes-Benz** since as a matter of precedent, it was not open to them to choose to prefer a dissenting judgment. He therefore urged this Court to allow the appeal.

Convoy's Submissions

[79] Learned Queen's Counsel, Mr. Paul McGrath, contended that the **Black Swan** jurisdiction is well established, and has been applied in the BVI at first instance and upheld on appeal for nearly ten years. He relied on the case of **Yukos CIS Investments Limited v Yukos Hydrocarbons Investments Limited** in support of this argument.

[80] Mr. McGrath, QC submitted that **Black Swan** is clear authority that this Court has jurisdiction to grant Mareva relief notwithstanding the fact that it will not be the BVI Court which determines or has jurisdiction to determine the underlying substantive final rights arising from the substantive dispute. He argued that the issue is not the relationship between the Mareva jurisdiction and the underlying substantive issues but rather whether the well-established criteria of granting the Mareva injunction are established on the facts. He maintained that the relevant relationship of the Mareva is with the potential enforcement of the foreign judgment in the BVI and not with the underlying cause of action being determined in the relevant foreign jurisdiction.

[81] Mr. McGrath, QC submitted that it is not necessary for this Court to reconsider the decision in **Black Swan** or how section 24 of the **Supreme Court Act** was invoked in **Black Swan** or the subsequent cases. He stated that it is apparent from the judgment

that the learned judge not only understood the power he was invited to exercise, but that he had due regard to the relevant authorities, the scope of the power available to him and properly exercised his discretion. He therefore urged this Court to dismiss the appeal and grant costs in favour of Convoy.

Discussion

[82] The essence of this appeal is to challenge the correctness of the learned judge's exercise of jurisdiction to grant a freezing order against Broad Idea, a BVI Company, in circumstances where Convoy had not sued Broad Idea in any part of the world.

[83] Issues 1 and 2 are inextricably linked and therefore it is convenient to address them together.

Issue 1 - Whether in the absence of statutory provisions, it is possible for the Court to grant a freezing injunction against a person against whom there is no cause of action in any part of the world.

Issue 2 - If so, whether the jurisdiction extends to granting a freezing injunction in support of foreign proceedings to which the person is not a party.

[84] Broad Idea's primary complaint is that the learned judge had no jurisdiction to grant the freezing injunction against it since Convoy had filed no cause of action against it and had neither indicated nor given an undertaking of its intention to do so in the BVI nor anywhere in the world.

[85] It is well-established that a court has three types of jurisdiction; personal, territorial and subject matter jurisdiction. It is agreed between the parties that, Broad Idea, having been incorporated in the BVI, is resident in the BVI so in the general sense, the Commercial Court has personal³⁰ or territorial jurisdiction as distinct from subject matter. This appeal is concerned with subject matter jurisdiction.

³⁰ This can arise either where the defendant is either resident or domiciled within the jurisdiction, the defendant has submitted to the jurisdiction.

[86] It is noteworthy that the jurisdiction to grant a freezing order in aid of foreign proceedings is an exorbitant one and in order for the court to be able to do so, there must be a proper basis. Consequently, it is important to ascertain the extent of the Commercial Court's jurisdiction to grant injunctive relief. Section 24 (1) of the **Supreme Court Act** stipulates that:

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

[87] It is trite that a Mareva injunction or a freezing injunction is an interlocutory remedy meant to restrain a defendant from removing his assets from the jurisdiction or from dissipating them before the trial of the claim. It is indisputable that the **Supreme Court Act** gives the High Court jurisdiction to grant injunctions. As far back as 1975, it has been judicially recognised that the courts have jurisdiction to grant Mareva injunctions.

[88] The main tenets of a Mareva injunction are that where a claimant can show a good arguable claim to be entitled to money from a defendant and there is a real risk that the defendant will remove assets from the jurisdiction or deal with them so as to render them unavailable or untraceable, the court may grant an injunction to restrain the defendant from removing them from the jurisdiction or from dealing with the assets. In the **Mareva** case, the court held that section 45 of the Supreme Court of Judicature (Consolidation) Act of 1925, which is analogous to section 24 of the **Supreme Court Act**, provided that an injunction may be granted by an interlocutory order of the court in all cases in which it appears to the court to be just and convenient and that was one such case.

[89] Due to the far reaching consequences of the Mareva injunction, there are several safeguards that are built into the court's exercise of discretion such as the need for the existence of a cause of action or a substantive claim against the defendant. Indeed, the main purpose of the Mareva injunction, in relation to commercial disputes since its

foundation, is to prevent judgments of the court from being rendered ineffective.³¹ Against that backdrop, I fail to see on what basis a Mareva injunction could have been properly granted by the learned judge in circumstances where there is no cause of action or a substantive claim against Broad Idea in the BVI or in any part of the world.

[90] As I consider the issues identified above, I observe and apply the helpful dicta of Lord Diplock in **the Siskina** that:

“**A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own.** It is dependent upon there being a pre-existing cause of action against the defendant...The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.” (emphasis mine)

[91] It is a well-established general principle of law that an injunction is not a cause of action. In order for a court to grant an injunction, the party seeking it must establish a cause of action against the defendant. In the well-known case of **Fourie v Le Roux and Others**, it was judicially recognised that there is the overriding requirement that the applicant must have a cause of action in law which entitles him to substantive relief against the defendant in order to be able to obtain an injunction against the said defendant. This much is settled and the principle has been consistently followed in cases such as **the Siskina**, **Channel Tunnel Group v Balfour Beatty Construction Ltd.** and **Mercedes-Benz A.G. v Leiduck**.

[92] In **Channel Tunnel Group**, Lord Brown-Wilkinson commenting on the court’s power to grant an interim injunction, enunciated as follows:

“Even applying the test laid down by the *Siskina* the court has the power to grant interlocutory relief based on a cause of action recognized by English law against a defendant duly served where such relief is ancillary to a final order...”

[93] In the Privy Council decision of **Mercedes-Benz**, Lord Mustill stated at page 298:

³¹ It is noteworthy that though the Mareva injunction developed in relation to commercial disputes, its application is not restricted to commercial cases; see: *Allen v Jambo Holdings Ltd* [1980] 2 All ER 502.

“...Their Lordships are far from convinced that it is permissible to issue an originating process claiming only *Mareva* relief, even against a defendant present within the jurisdiction, rather than to proceed by summons or motion in an existing action or one which the applicant undertakes to commence as a condition of obtaining an order. For if the defendant fails to appear to the writ the plaintiff is entitled to judgment in default for the relief claimed, and there is something strange about a final judgment for a *Mareva* injunction; a remedy which, as is well established, embodies no adjudication by the court on the rights of the parties and takes effect only until such an adjudication has taken place in other proceedings...”

[94] Lord Bingham of Cornhill in **Fourie** made the following judicial pronouncements at paragraphs 2 to 3 of the decision of the House of Lords:

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

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

[95] The above pronouncements underscore the need for there to be a cause of action or at the very least a substantive claim against the defendant. This is in great contradistinction to the underlying factual matrix of this appeal.

[96] This brings into sharp focus the issue of whether in **Black Swan**, the learned judge adopted the correct approach when he concluded that an injunction could have been granted against a defendant against whom there was no cause of action or any

substantial claim in any part of the world. In the present appeal, the learned judge felt able to have granted the freezing injunction against Broad Idea by relying on the Commercial Court decision in **Black Swan**. It is unnecessary to chronicle the facts in the case of **Black Swan** but suffice it to say that the actual circumstances, for present purposes, are similar to those in this appeal. In **Black Swan**, the learned judge held that there is high authority (**Mercedes-Benz** and **Fourie**) that the question of whether or not a freezing injunction should be granted in aid of foreign proceedings against a defendant who is subject to the court's jurisdiction is open and is not decided based on **the Siskina**.

[97] It is of significance that the learned judge in **Black Swan** felt able to grant the freezing injunction on the basis of the interpretation of the dissenting judgment of Lord Nicholls judgment in **Mercedes-Benz** which he described as 'compelling'. In so doing, the learned judge opted not to follow the highly persuasive conclusion of the House of Lords in **the Siskina**. Essentially, Lord Nicholls was of the view that the grant of a freezing injunction was not dependent on there being a pre-existing cause of action. It was on this basis that the learned judge concluded that the BVI court had jurisdiction to grant a freezing injunction against the defendant company against whom no cause of action was raised nor any substantive proceedings pursued.

[98] It is a well-established principle of law that a lower court is obliged to follow and apply the decision of the higher court save and except some limited circumstances which have no relevance to the present appeal. It is settled law that the High Court is bound by the decision of the highest appellate body, which in BVI is the Judicial Committee of the Privy Council ("the Privy Council"). I fail to see how the learned judge of the Commercial Court could have failed to properly apply the ratio decidendi in **Mercedes-Benz** which followed the tested pronouncements in **Mareva Compania Naviera SA v International Bulkcarries SA** and **The Siskina** and which had been consistently applied in our courts until **Black Swan**. The Board decided by a majority contrary to what the learned judge applied.

[99] This principle has been judicially recognised by Lord Mustill in **Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd** wherein His Lordship enunciated as follows:

“...the doctrine of the *Siskina*, put at its highest, is that the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependent on the enforcement of the substantive right, which usually although not invariably takes the shape of a cause of action...”

[100] This remains good law. It was not the law that the court has the jurisdiction to grant an injunction against a defendant merely on the basis that he is resident within the jurisdiction and irrespective of the fact that there is no cause of action or substantive claim against him. It must be remembered that the principle that was enunciated in **the Siskina** has been applied and followed for decades in our court, and to that extent represents the law.

[101] In respect to this appeal, I am fully in agreement with Mr. Morgan, QC that it simply was not open to the judge of the Commercial Court to ignore the majority view and fully apply the dissenting position as he interpreted it in **Mercedes-Benz**. There is no doubt that the majority decision of the Board in **Mercedes-Benz** was binding on the courts in the BVI. Therefore, Mr. McGrath, QC could not neutralize or disarm Mr. Morgan’s submissions in relation to the impermissibility for the learned judge in **Black Swan** to have relied on the dissenting judgment.

[102] It is noteworthy that I too share the view that Lord Nicholls in **Mercedes-Benz** did not go as far as the learned judge in **Black Swan** seemed to have understood him. However, for present purposes it is unnecessary for me to reach a definitive position on the interpretation of Lord Nicholls’ dissenting opinion for reasons which are self-evident and need no elucidation.

[103] I have no doubt that the only way in which the learned judge could have adopted the approach which he took in **Black Swan** was if there was a statute in the Eastern Caribbean which enabled the court to extend its jurisdiction so as to grant an injunction against a defendant against whom no cause of action arose and against whom there was no substantive claim. In my view, unless Mr. McGrath, QC could have pointed

this Court to statutory provisions which underpinned the approach the learned judge adopted in **Black Swan** and which seemed to have been followed in this case, he may well have had an uphill task.

[104] Section 24 of the **Supreme Court Act** has to be interpreted based on its clear meaning. It is apposite that a word of caution be given to myself of the need to be sure that statutory provisions which do not exist in the BVI and are therefore not part of the law are not relied upon in judicial determination. Based on a close examination of section 24, I am attracted to and persuaded by the submissions of Mr. Morgan, QC that the relevant section does not enable the High Court to grant injunctions in aid of foreign proceedings.

[105] The position in England and Wales is vastly different from that in the BVI since there has been statutory intervention, by virtue of section 25 of the UK Civil Jurisdiction and Judgments Act 1982, in order to confer on the courts there the jurisdiction to grant injunctions in support of foreign proceedings. To buttress this position, a clear process was provided for obtaining such an order by rule 25.4 of the Civil Procedure Rules of the United Kingdom. There is no such equivalent or enabling provision as section 25 or any other legislation in the BVI. In the absence of any statutory authorisation, it was not open to the learned judge in **Black Swan** to have concluded that he could have expanded the jurisdiction of the court, even though he was very well intentioned. In my view, the courts in the BVI, in the absence of legislative authority, have no jurisdiction to grant a free standing interlocutory in aid of foreign proceedings.

[106] In light of the above, I am of the view that the time has long come for the legislature to clothe the courts in the BVI with the jurisdiction to grant injunctions in aid of foreign proceedings. I have no doubt that there is great utility in having similar jurisdiction that is conferred on the courts in England and Wales and the Cayman Islands to grant free standing injunctions in support of foreign proceedings. The legislature in the BVI has experience in this regard as is evidenced by the **Arbitration Act, 2013** which expressly enabled the court to grant interim relief in aid of foreign arbitration proceeds.

[107] Consequently, I have arrived at the ineluctable conclusion that the learned judge in the court below, in so far as he seemed to have followed and applied **Black Swan**, erred in principle. To be clear, the learned judge though having personam jurisdiction over Broad Idea, a BVI company, had no subject matter jurisdiction to grant an interlocutory injunction in aid of foreign proceedings.

Issue 3 - Even if this is so, whether the learned judge properly exercised his discretion in granting the freezing order.

[108] In so far as I have also concluded that the courts in the BVI have no jurisdiction to grant freestanding injunctions in aid of foreign proceedings on the basis of personal jurisdiction alone, it is unnecessary to consider issue number 3. In my view, the determination of issues 1 and 2 disposes of the appeal.

Costs

[109] In so far as Broad Idea has succeeded on this appeal it is entitled to two thirds of the assessed costs in the court below.

Costs - Convoy's 25th February 2018 Application

[110] I too shall agree that Broad Idea is entitled to costs in relation to Convoy's 25th February 2018 application, since Convoy did not pursue any relief under the said application.

Conclusion

[111] For the above reasons, I too would allow Broad Idea's appeal and make the same orders as indicated by the learned Chief Justice in paragraph 70 of her judgment.

[112] I gratefully acknowledge the assistance of all learned counsel.

[113] **WEBSTER JA:** I have had the advantage of reading in draft the judgment of the learned Chief Justice, Dame Janice Pereira. For the reasons she gives, I would allow the appeal and make the orders that she proposes.

By the Court



Chief Registrar