EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO. BVIHCM 2021/0022

BETWEEN

OSCAR TRUSTEE LIMITED
(as Trustee of the Chloe Trust)

Claimant

and

MBS SOFTWARE SOLUTIONS LIMITED

Defendant

and

[1] MATTHEW PAGET

[2] REID ZULPO Respondents

Appearances:

Sharif A. Shivji KC with Jonathan Addo and André McKenzie for the Defendant
David Mumford KC with Ryan James Turner and Tamara Cameron for the Respondents

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2024: March 5;
April 18.

JUDGMENT

[1] **WEBSTER J [AG]**. When this matter came on for hearing on 5th March 2024 there were two applications before the Court:

(1) the defendant's application under the Civil Procedure Rules 2000 for an order that the respondents, Matthew Paget and Reid Zulpo (together "**the Respondents**"), be jointly and severally liable with the claimant, Oscar Trustee Limited ("**OTL**"), to pay the costs awarded to the defendant, MBS Software Solutions Limited ("**MBS**") in the proceedings in the Commercial Court in this claim (BVIHC (COM) 2021/0022) and in related appellate proceedings in BVIHCMAP 2021/0024 ("**the NPC Application**"); and

(2) the Respondents' cross-application to set aside an order of Jack J made ex parte on 1 November 2022 adding the Respondents as parties to the proceedings and ordering service of the NPC Application and related documents outside the jurisdiction on the Respondents and by alternative service within the jurisdiction ("**the Set-aside Application**").

[2] At the commencement of the hearing on 5 March 2024 the Court heard a contested application by the Respondents to vacate the hearing of the NPC Application and deal only with the Set-aside Application. The Application was granted and the hearing of the NPC Application was vacated for a new hearing date to be fixed by the Court. The Court proceeded to hear the Set-aside Application.

Background

[3] The claimant, Oscar Trustee Limited ("**OTL**"), is a company incorporated in New Zealand. The first respondent, Mr. Paget, is the sole director and shareholder of OTL. OTL is the sole trustee of the Chloe Trust, a discretionary trust for the benefit of Mr. Paget and his family. The original trustee of the Trust was Oscar Corporation

Pty Ltd, an Australian company ("**Oscar Corporation**"), until it retired on 22 December 2016 and was replaced by OTL.

[4] The Respondents are both professional men. Mr Paget is a lawyer in New Zealand and the second respondent, Mr. Zulpo, is an accountant in Australia. In 2012, together with a Mr Simon Butler, the sole director of MBS, they invested substantial amounts of money via Oscar Corporation in a mining project in Turkey. The project was being pursued by MBS. The mining project failed and unhappy differences developed between Mr. Butler on the one hand and the Respondents on the other. MBS claimed that it repaid Oscar Corporation the full amount of its investment. Oscar Corporation denied this. In December 2016 Oscar Corporation retired as the trustee of the Chloe Trust and was replaced by OTL. In February 2021 OTL, as the successor trustee of the Chloe Trust and assignee of Oscar Corporation's chose in action against MBS commenced proceedings against MBS in the Commercial Court seeking over US$5 million as its return on the investment originally made by Oscar Corporation.

[5] On 8 March 2021 MBS applied to stay the proceedings in favour of the courts of Hong Kong on the ground of forum non conveniens. OTL cross-applied for summary judgment on its claim. Both applications were heard by Jack J who dismissed the summary judgment application, granted MBS' stay application, and awarded costs of both applications to MBS. Jack J ordered a detailed assessment of those costs and ordered OTL to make an interim payment of US$600,000.00. OTL did not pay any part of the amount awarded. OTL applied to the Court of Appeal for leave to appeal against the orders of Jack J and for a stay of execution of the orders and the costs assessment proceedings, pending the determination of the intended appeal. The leave application was granted but the stay application was dismissed by a single judge of Court of Appeal with costs of the application to be paid by OTL to be assessed if not agreed. The appeal was dismissed and the stay of the proceedings in favour of Hong Kong was maintained. The Court of Appeal awarded MBS its costs of the appeal at two-thirds of the amount of costs awarded in the lower court.

[6] OTL applied to the Court of Appeal for conditional leave to appeal to the Privy Council. MBS applied in the conditional leave to appeal proceedings for orders that OTL be debarred from pursuing the conditional leave application unless and until it pays all the outstanding costs that had been ordered against it and provide security of $100,000.00 for the costs of the conditional leave application. The Court of Appeal granted MBS's application and stayed the application for conditional leave to appeal until OTL paid all outstanding costs due to MBS and provided security for the costs of the conditional leave to appeal application.

[7] On 26 January 2023 Mangatal J carried out a detailed assessment of costs orders against OTL and found that the total amount of costs due to MBS was US$1,275,068.23. There is also an additional claim for US$243,903.84 for the costs incurred by MBS in the conditional leave application. These costs have not been assessed. OTL has not paid any part of the assessed or unassessed costs, claiming that it does not have the assets or resources to make any of the payments. As a result, its claim against MBS is stayed indefinitely, and because of its pleas of impecuniosity, may never go forward.

The non-party costs application

[8] Faced with the challenges of collecting its costs from OTL, MBS applied to the Commercial Court on 26 October 2022 for a non-party costs order (the NPC Application) against the Respondents who are not resident in the jurisdiction. The NPC Application was made under parts 64.10, 19.1, 7.3, 7.14 and 7.8A of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000, and/or the inherent jurisdiction of the Court, for the following relief:

> 1. An order that the Respondents be jointly and severally liable with OTL to pay any costs awarded to MBS in (a) the Commercial Court proceedings; and (b) in the related appeal proceedings
> 2. In support of the NPC application, orders that:

a) the Respondents be added as parties to the Commercial Court proceedings for the purposes of costs only, pursuant to CPR 19.3(1);
b) MBS be permitted to serve the NPC Application and any other relevant documents in the proceedings ("the Documents") on the Respondents out of the jurisdiction pursuant to CPR 7.3 (2), (10) and 7.14;
c) MBS be permitted to serve the Documents on the Respondents by alternative means pursuant to CPR 7.8A.

The NPC Application also sought orders relating to the filing of evidence in the proceedings, and costs.

[9] Jack J heard the application for the supporting orders in the NPC Application ex parte on the 1 November 2022 and made the following orders:

(1) the Respondents be added as parties to the proceedings for the purposes of costs only;

(2) MBS be permitted to serve the Documents on the Respondents out of the jurisdiction;

(3) MBS be permitted to serve the Documents on the Respondents by alternative means (as set out in the application);

(4) directions for the filing and service of evidence in the NPC Application; and

(5) costs in the NPC Application.

[10] On 22 November 2022 the Respondents filed the Set-aside Application seeking orders that the order made on 1 November 2022 granting permission to serve the Respondents outside the jurisdiction and the alternative service order be set aside; and a declaration that the Court does not have jurisdiction over the Respondents; and that the Respondents have not been served with the NPC Application.

[11] It is apparent that there is overlap between the issues in the two applications that are before the Court, but having regard to the circumstances, including that the Set-aside Application goes to the jurisdiction of the Court to hear the NPC Application,

the Court decided to hear the Set-aside Application first and vacated the hearing of the substantive NPC Application.

[12] The issues that arise from the evidence, the Set-aside Application and the submissions of counsel are:

(1) Whether the Civil Procedure Rules 2000 ("the Old Rules") or Civil Procedure Rules (Revised Edition) 2023 ("the New Rules") apply to the Set-aside Application;
(2) The jurisdiction of the court to hear and determine the NPC Application;
(3) Whether part 7 of the Old Rules, and in particular rule 7.14, allows service out of jurisdiction of the NPC Application at all, and if so, on the facts of this case; and
(4) Whether the court has jurisdiction over the Respondents.

The Respondents did not pursue the challenge to the alternative service order.

[13] I will now deal with these issues in the order listed in the preceding paragraph.

Which Rules apply

[14] The New Rules came into effect on the transitional date of 31 July 2023 ("**the Transitional Date**"). They repealed the Old Rules as of that date.

[15] By the Transition Date the claim, which was filed on 7 February 2021, had been stayed by Jack J on 6 July 2021, and the stay has not been lifted. The NPC Application was filed on 25 October 2022 and Jack J made the service out, alternative service and joinder orders on 1 November 2022. These orders were made applying the Old Rules which, in some respects, has provisions that are very different from the provisions in the New Rules. Importantly for this application, part 7 of the New Rules dealing with service of court process outside the jurisdiction is substantially different from part 7 in the Old Rules, and some of the changes have a direct impact on the Set-aside Application.

[16] The hearing date for the Set-aside Application was fixed by the Court on 19 June 2023, before the Transitional Date, for a hearing on 5 March 2024.

[17] The issue that arises is which Rules should the Court apply when considering the Set-aside Application which challenged the ex parte order made by Jack J under the Old Rules, bearing in mind that the Set-aside Application was filed and a hearing date was set before the Transitional Date. This is a novel issue which, as far as I am aware, has never been considered by the courts. It requires careful consideration of the transitional provisions in part 75 of the New Rules. The relevant parts of part 75 are:

> "**Scope of this Part**
> 75.1 (1) This Part deals with the way in which actions, matters and other proceedings in existence at the commencement date become subject to these rules.
> **New proceedings**
> 75.2 These rules apply to all proceedings commenced on or after the commencement date.
> **Old proceedings**
> 75.3 (1) These rules do not apply to proceedings commenced before the commencement date in which a trial date has been fixed unless that date is adjourned.
> (2) In proceedings commenced before the commencement date, an application to adjourn a trial date is to be treated as a pre-trial review and these Rules apply from the date that such application is heard.
> (3) If a trial date has not been fixed in proceedings commenced before the commencement date –
>
> > (a) the court office must fix a date, time and place for a case management conference under Part 27 after a defence has been filed and give all parties at least 28 days' notice of the conference; and
> > (b) these rules apply from the date of the case management conference."

[18] Rule 75.1 states the obvious – the transitional provisions apply to all proceedings before the court, not just trials. It is equally obvious that rule 75.2 does not apply in this case because the NPC Application started before the Transitional Date.

[19] The NPC Application could fall under sub-rule 75.3 because it was filed before the Transitional Date. It is an "Old proceeding", and the Old Rules would apply if a trial

date had been fixed for the hearing of the Application before 31 July 2023. Whether this rule applies to the NPC Application, for which the Court had fixed a hearing date before 31 July 2023, depends on the meaning of the words used in rule 75.3 and whether a hearing date is a trial date within the meaning of the rule.

[20] Mr. Sharif Shivji KC who appeared for MBS submitted that rule 75.3 applies to trials and in this matter "[T]here was no trial and there will never be one because the proceedings have been stayed. All that is now required for the new CPR to apply is the listing of a CMC: r.75.3(3)."[1] He concluded that there is no trial date and therefore the New Rules apply to the NPC Application.

[21] Mr. David Mumford KC who appeared for the Respondents took the opposite position. He submitted that a date for the hearing of the Set-aside Application had been fixed and the Application is governed by the Old Rules. He disputed Mr. Shivji's submission that all that needs to be done is to list a case management conference to bring the matter under the New Rules. He said that it was not clear how listing a case management conference (for an application with a fixed hearing date) would bring the NPC Application under the New Rules. The claim was stayed and there cannot be a case management conference on a stayed claim. Further, it would be wholly improper to convene a case management conference for the purpose of changing the rules that apply to the proceedings thereby giving the court jurisdiction. A date was set for the hearing of the NPC Application and the Old Rules apply.

[22] I prefer the submissions of Mr. Mumford KC. The NPC Application is the only remaining matter in the proceedings, the claim having been stayed. The orders that are challenged in the Set-aside Application were made under the Old Rules. At that time leave to serve a claim form outside the jurisdiction was required and there was no rule allowing a non-party costs application to be served on persons outside the jurisdiction unless permission to serve the claim form outside had already been given. No such permission had been applied for or given in this case. The Respondents challenged the service out order because it did not comply with the

[1] Paragraph 65 of the MBS skeleton

provisions of the rules under which it was made (rule 7.14). If the New Rules apply the Respondents will lose the opportunity to challenge the service out order based on MBS's failure to comply with the procedures in the former rule 7.14.

[23] I find that part 75.3 should be given a wide interpretation and the words "trial date" are not restricted to trial dates for the trial of a claim, but extend to "actions, matters and other proceedings in existence at the commencement date" (rule 75.1). Where, as in this case, an ex parte application was determined under the Old Rules; an application to set aside the order was made and a date set for the hearing of the application before the Transitional Date; and the New Rules have a significant impact on the issues in the Set-aside Application, the Old Rules should be applied to determine the Application. I will consider the Application under the Old Rules.

Issue 2 – Jurisdiction to make a non-party costs order

[24] The source of the court's jurisdiction to make a non-party costs order is now settled by the decision of the Court of Appeal in **Halliwel Assets Inc v Hornbeam Corporation**[2]. The source of the jurisdiction in England was historically section 50(1) of the **Supreme Court of Judicature (Consolidation) Act 1925 ("the 1925 Act")** which reads -

> **"**Subject to the provisions of this Act and to rules of Court and to the express provisions of any other Act, the costs of and incidental to all proceedings in the Supreme Court including the administration of estates and trusts shall be in the discretion of the court or judge and the court or judge shall have full power to determine by whom and to what extent costs are to be paid."

The unanimous judgment of the Court in **Halliwel** was delivered by the learned Chief Justice who found that section 50(1) of the 1925 Act was imported into and applies in the Virgin Islands by section 7 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**.

[2] BVIHCMAP2015/0001

[25] The court's power to make non-party costs orders is contained in rule 64.3 and 64.10 of the Rules.[3] The combined effect of section 50(1) of the 1925 Act and rules 64.3 and 64.10 is that the court has jurisdiction and power to make a costs order against a non-party.

Issue 3 - Whether part 7 of the Old Rules, and in particular rule 7.14, allows service out of the NPC Application on the facts of this case

[26] The rules about non-party costs orders were carefully considered by the Court of Appeal in **Halliwel**. Mr. Shivji KC relied on the decision as supporting his position that Jack J was correct to grant permission (under rule 7.14) to serve the NPC Application outside the jurisdiction on the Respondents. Mr. Mumford KC submitted that the findings of the Court of Appeal on the meaning of rule 7.14 are not binding on this Court and this Court can come to its own decision on the meaning of rule 7.14.

[27] In **Halliwel** the Court of Appeal referred firstly to the power in rule 64.3 to order a party to proceedings to pay the costs of a non-party. Rule 64.3 provides that –

> "The court's powers to make orders about costs include power to make orders requiring a party to pay the costs of another person arising out of or related to all or any part of any proceedings."

[28] The Court then considered the obverse situation that obtains in this case where a party to proceedings (MBS) is seeking costs from a non-party (the Respondents). Rule 64.10 states:

> "(1) This rule applies where
> (a) an application is made for; or
> (b) the court is considering whether to make
> an order that a person who is not a party to the proceedings nor the legal practitioner to a party should pay the costs of some other person."
> (2) Any application by a party must be on notice to the person against whom the costs order is sought and must be supported by evidence on affidavit.

[3] Rules 64.3 and 64.10 are set out in paragraphs 27 and 28 respectively below

> (3) If the court is considering making an order against a person the court must give that person notice of the fact that it is minded to make such an order.
> (4) A notice under paragraph (3) must state the grounds of the application on which the court is minded to make the order.
> (5) A notice under paragraph (2) or (3) must state a date, time and place at which that person may attend to show cause why the order should not be made.
> (6) The person against whom the costs order is sought and all parties to the proceedings must be given 14 days' notice of the hearing."

[29] I pause here to note that rule 64.10 does not contain the new subrules (7) and (8) that were introduced by the New Rules. The new subrules state:

> "(7) A notice under paragraph (2) or (3) may be given to a person outside the jurisdiction of the court.
> (8) A notice under paragraph (2) or (3) is required to be served but, if the person to be served is outside of the jurisdiction of the court, leave is not required."

The new subrules empower the Court to serve a non-party costs order application on a person outside the jurisdiction, and to do so without the Court's permission. If these subrules were to be applied retrospectively to MBS' NPC Application, they would have a significant impact on the Respondents' chance of success. MBS would not need to prove that Jack J did not err in granting permission to serve the NPC Application on the Respondents outside the jurisdiction. This would deny the Respondents advantages that they now have of challenging the service out order.

[30] Returning to **Halliwel,** the appellants were granted costs orders against the respondent, Hornbeam Corporation. Hornbeam did not pay the costs ordered and the appellants applied for an order that their costs be paid by a Mr. Vadim Shulman, the ultimate beneficial owner of Hornbeam. The appellants applied to join Mr. Shulman as a party to the proceedings for the purpose of the costs application and for permission to serve Mr. Shulman outside the jurisdiction. The learned trial judge, without addressing the merits of the joinder application and the costs application, refused permission to serve out because part 7.3 of the Old Rules did not have a

gateway for serving a non-party costs application outside the jurisdiction. The appellants appealed against the judge's order.

[31] The Court of Appeal reversed the decision of the trial judge. The Court found that CPR 7.14 contemplates service of a non-party costs order application outside the jurisdiction where the claim form itself qualifies for service out of the jurisdiction and permission to serve out may be granted by the Court. The Court did not accept an argument by the appellants that it was necessary for permission to serve out to have been granted before rule 17.14 could be engaged. However, the Court found that for CPR 7.14 to be engaged Mr. Shulman had to be joined as a party to the proceedings. The claim for costs without more did not make him a party to the proceedings. As such, the appropriate course was to remit the application to the court below to consider and determine the joinder application on its merits along with the non-party costs application and the application for permission to serve out.

[32] The Court of Appeal acknowledged that a non-party costs application is not a claim form procedure and therefore does not, by itself, qualify for service under CPR part 7. However, if the claim form qualifies for service under CPR part 7, this is sufficient to serve an application outside the jurisdiction without permission pursuant to CPR rule 7.14. A prior order for service is not necessary. For example, at paragraph 29 the Chief Justice stated-

> "Further, CPR 7.14 contemplates service of an application out of the jurisdiction where the claim form itself qualifies for service out of the jurisdiction and where permission may be granted by the court."

[33] Mr. Mumford KC did not agree with this position. He submitted that rule 7.14 is clear and unambiguous and requires a prior order granting permission to serve the claim form outside the jurisdiction for the rule to be engaged. Qualification for service out, without an order for service out, is not sufficient. He referred to rule 7.14 which provides that –

> "(1) An application …order or notice issued, made or given in any proceedings may be served out of the jurisdiction without the court's

> permission if it is served in proceedings in which court process has been served out of the jurisdiction pursuant to rule 7.2" (Emphasis added)

[34] Mr Mumford referred to the decision of the Court of Appeal in **Convoy Collateral Ltd v Broad Idea International Ltd and Cho Kwai Chee**[4], a case involving an application to serve a freestanding injunction on the second defendant, Mr Cho, outside the jurisdiction. The Court of Appeal found at paragraph 39 that -

> "I also disagree with Mr. McGrath's reliance on rule 7.14(2) of the CPR in support of his submission that the judge did not construe rule 7.3(2) properly in the context of rule 7 as a whole. The judge did not err in not considering rule 7.14. The rule provides that an application in any proceedings may be served out of the jurisdiction without the court's permission if it is served in proceedings in which permission has been given to serve the claim form out of the jurisdiction. The rule does not apply in this case because the court had not given prior permission to serve a claim form in the proceedings. In the absence of the prior permission the applicant for a freestanding injunction in support of foreign proceedings must obtain permission to serve application out of the jurisdiction and for all of the reasons set out above the court does not have power to give such permission."

[35] Mr Mumford submitted that this is the correct interpretation of rule 7.14 which clearly requires a prior order for service out for rule 7.14 to be engaged. He compared rule 7.14 with the equivalent provision in England in the repealed Rules of the Supreme Court order 11 rule 9(4). Order 11 rule 9(4) was considered by the Court of Appeal of England in **Union Bank of Finland Ltd v Lelakis**[5] which was relied on by the Court of Appeal in **Halliwel**. In **Union Bank** the defendant was domiciled and resident in Greece and permission to serve him outside the jurisdiction was not necessary because Greece is a party to the Convention on Jurisdiction and Enforcement of Civil and Commercial Matters 1968. The claim form was served on his agent in London. The plaintiff obtained judgment in default of acknowledgement of service and an order for the defendant to attend before the court to be examined about his assets. The order was served on the defendant, without leave, outside the jurisdiction in Greece and in New York. The lower courts dismissed the defendant's

[4] BVIHCMAP 2019/0014
[5] [1997] 1 WLR 590

application to set aside service of the order and the Court of Appeal dismissed his appeal. In dismissing the appeal, the Court of Appeal noted that since permission to serve the claim form was not required, the same was true of other documents in the claim such as the order for examination. The Court of Appeal relied on RSC order 11 rule 9 (4) which provides -.

> "Service out of the jurisdiction of any summons, notice or order issued, given or made in any proceedings is permissible with leave of the Court but leave shall not be required for such service in any proceedings in which the writ, originating summons, motion or petition may by these rules or under any Act be served out of the jurisdiction without leave."

This rule is materially different from rule 7.14 of the EC CPR. The English provision, as seen in **Union Bank**, is engaged when the originating process can be served out of the jurisdiction without permission. In that situation the subsequent document may be served out without leave. The rule does not require a prior order for service out, only that the originating process can be or qualifies for service outside the jurisdiction.

[36] On the other hand, the power to serve an application outside the jurisdiction without permission under rule 7.14 is triggered when, and only when, the originating process has been served outside the jurisdiction with the permission of the court.[6] When the claim form in this case was issued there was no issue of service outside the jurisdiction because the sole defendant was a BVI company resident and domiciled in the Territory. The claim was stayed on 6 July 2021, and thereafter there was no issue of obtaining permission to serve the claim form which had been stayed.

[37] Mr. Shivji KC did not address the issue of the service of the NPC Application in detail, probably because his position is that the service of the NPC Application was carried out in accordance with part 7 of the New Rules which clearly allows service of an application outside the jurisdiction without permission. Alternatively, if the Old Rules apply, the service of the Application was valid applying the decision in **Halliwel**.

[6] See paragraphs 31 to 35 above for a more detailed discussion of rule 7.14

[38] I prefer the submissions of Mr Mumford and agree that the NPC Application could not be properly served outside the jurisdiction on the Respondents because there was no prior permission to serve the claim form outside the jurisdiction. In fact, for the reasons stated above, there was no intention or necessity to serve the claim form outside the jurisdiction because MBS was resident in the BVI. The claim has now been stayed indefinitely and cannot, as a matter of law, be served within or outside the jurisdiction. The decision in **Halliwel** does not assist MBS but I must still consider the binding effect of the decision on this Court.

Binding effect of Halliwel

[39] Mr Mumford KC also addressed the issue of the binding effect of the decision of the Court of Appeal in **Halliwel**. He submitted that this Court is not bound to follow the findings of the Court of Appeal on the issue of the interpretation of rule 7.14 because those findings were obiter to the decision in the case. The substantive issues in the case were (i) whether Mr Shulman should be joined as a party in the proceedings; (ii) the service of the costs application on Mr Shulman outside the jurisdiction without leave; and (iii) the costs application itself (together "the Substantive Issues"). The Court of Appeal made findings on the general principles relating to service of applications under rule 7.14, but on the Substantive Issues the Court decided that –

> "The appropriate course however is for the court below to consider the joinder application and determine it on its merits along with the non-party costs application and permission to serve out"[7]

This observation by the Court of Appeal is consistent with its finding that the judge of the lower court erred by not considering the joinder application. This, Mr Mumford says, is the ratio decidendi of the case and the Court's findings on the jurisdiction and power to serve an application outside the jurisdiction were not necessary to resolve the case. They are obiter statements that are not binding on other courts but may be cited as persuasive authority in future litigation. A statement of this principle can be found in **Halsbury's laws of England** –

[7] Paragraph 30 of the judgment

> "Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand are generally termed 'dicta'. They have no binding authority on another court, although they may have some persuasive efficacy. Mere passing remarks of a judge are known as 'obiter dicta', whilst considered enunciations of the judge's opinion on a point not arising for decision, and so not part of the ratio decidendi, have been termed 'judicial dicta'."[8]

[40] A good example of this kind of dicta is the decision of the Privy Council in the joint appeals **Convoy Collateral Ltd v Broad Idea International Ltd; Convoy Collateral Ltd v Cho Kwai Chee**[9]. The opinion of the Board contains decisions from two appeals from the Eastern Caribbean Court of Appeal. The appeal that is relevant to the obiter point is the appeal against the Court of Appeal's decision to set aside a free-standing freezing injunction against Broad Idea Limited, a BVI company. The Court of Appeal set aside the injunction on the legal and factual grounds. The factual ground, which was affirmed by the Board, is that there was insufficient evidence to show that Broad Idea held funds that were beneficially owned by the second defendant, Mr Cho. Having affirmed this finding, the Board dismissed Convoy's appeal against the refusal to grant the free-standing freezing injunction. This is the ratio decidendi of the appeal against Broad Idea. The majority of the Board, Lord Leggatt, Lord Briggs, Lord Sales and Lord Hamblen, took the opportunity to state the Board's view on the court's equitable power to grant a freestanding freezing injunction against a respondent over whom the court has personal jurisdiction, provided certain other conditions are present. This represented a fundamental and long-awaited development of the law relating to freezing injunctions and the learned pronouncements of their Lordships were welcomed by legal and business communities in the Virgin Islands and elsewhere. However, they are obiter dicta that were not necessary to the decision that the Board had to make. The Board's findings on freezing injunctions have been followed in subsequent cases, no doubt because they came from the apex appeal court which in these appeals sat with a panel of seven Law Lords.

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[8] Halsbury's Laws of England, vol. 3, p. at para 26
[9] [2023 AC 389 2

[41] Applied to the instant appeal the learned pronouncements by the Court of Appeal in **Halliwel** about the procedure for non-party costs applications outside the jurisdiction are obiter and not binding on this Court.

[42] Mr Mumford submitted that another reason why the findings in **Halliwel** are not binding on this Court is that they conflict with the decision of the Court of Appeal in **Convoy Collateral Ltd v Cho Kwai Chee**[10] which found that the service of an application in that case outside the jurisdiction without permission is possible under rule 7.14 only in the proceedings in which permission to serve the claim form out of the jurisdiction has been given. It is not sufficient that the claim form qualifies for service. I dealt with this point in paragraphs 34-38 above. This finding by the Court of Appeal was left undisturbed by the Privy Council in its judgment delivered in October 2021 in **Convoy Collateral Ltd v Broad Idea International Ltd; Convoy Collateral Ltd v Cho Kwai Chee**[11]**.** In fact, Sir Geoffrey Vos MR, in a dissenting judgment with which Lord Reed and Lord Hodge agreed, gave tacit approval to the finding of the Court of Appeal. After considering the provisions of part 7 dealing with service of a claim form outside the jurisdiction, including rule 7.14 which he set out in extenso in paragraph 194, he continued in paragraph 196 –

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

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

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[10] BVIHCMAP2016/0030
[11] [2023] AC 389

[44] In the circumstances I find that this Court is not bound to follow the dicta of the Court of Appeal in **Halliwel** and can come to its own conclusions on the meaning of rule 7.14. That conclusion is that rule 7.14 is only engaged in proceedings where permission to serve the claim form outside the jurisdiction had been given. If permission has been given, an application to serve the application outside the jurisdiction (in this case the NPC Application) would not be necessary. If permission was not given the applicant (MBS) cannot rely on rule 7.14.

[45] Pulling the strings together I find that the Court has jurisdiction under section 50(1) of the 1925 Act, and rules 7.10 and 7.14 of the Old Rules to serve a non-party costs application outside the jurisdiction on a person who is not a party to proceedings, provided that the proceedings were initiated by a claim form for which permission has been given to serve the defendant outside the jurisdiction; it is not sufficient and rule 7.14 is not engaged if the originating process "qualifies for service out of the jurisdiction"; there must be an actual order for service of the process outside the jurisdiction which is what engages the court's jurisdiction over the non-party outside the jurisdiction; the decision of the Court of Appeal in **Halliwel** is not binding on this Court and the Court will follow the interpretation of rule 7.14 in the Court of Appeal's decision in **Convoy Collateral v Cho**.

Other points raised by MBS

[46] MBS relied on two additional points. Firstly, that even if the Old Rules apply to these proceedings the Court has a discretion under rule 75.4 of the New Rules to take into account principles in the New Rules when considering a matter to which the Old Rules apply. Rule 75.4 provides that

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

Part 1 contains the court's overriding objective to deal with cases justly and part 25 deals with the court's case management objective of actively managing cases. Mr.

Shivji KC submitted that the Court should exercise discretion in this case by applying the new rule 7.17 which allows service of an application, such as the NPC Application, outside the jurisdiction without permission if the application is served in proceedings in which court process has been served out of the jurisdiction under rule 7.2.

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

[48] MBS' other point is that the application for permission to serve the NPC Application outside the jurisdiction on the Respondents, and the order of Jack J permitting service, referred to permission to serve "[T]he Non-Party Costs Application and any other relevant documents in the Proceedings (the Documents)". Mr. Shivji KC submitted that if an order for service out of the claim is needed, this would suffice because the reference to "other relevant documents" includes the claim form which was therefore served out with permission.

[49] I have several difficulties with this submission:

(i) Neither the application or the order for service mention the claim form by name. It is simply assumed to be included in the general description of "Documents".

(ii) There was no application for service out of the claim form when the NPC Application was made.

(iii) Fundamentally, the claim form was stayed and no further steps can be taken in the claim until the stay is lifted by an order of the Court. The service out order on 1 November 2022 could not elevate the claim into one for which permission to serve out has been given in accordance with part 7.

[50] I find that the order giving permission to serve the NPC Application and "the Documents" outside the jurisdiction does not fulfil the requirement in rule 7.14 of being proceedings in which permission has been given to serve the claim form outside the jurisdiction.

Conclusion

[51] The application to set aside the order for alternative service on the Respondents was not pursued and no order on this part of the Set-aside Application is necessary other than to take it into consideration in dealing with costs.

[52] It is declared that valid service of these proceedings on the Respondents has not been effected and that the Court does not have jurisdiction over the Respondents.

[53] It is ordered that:

(1) The Order of Jack J dated 1 November 2022 be set aside.
(2) Service of the Defendant's NPC Application dated 25 October 2022 be set aside.
(3) The Respondents shall have 80% of their costs of the Set-aside Application to be assessed if not agreed within 21 days.

[54] The assistance of counsel is greatly appreciated.

Paul Webster (Ag.)
High Court Judge

By the Court

Registrar