Michaelmas Term

[2021] UKPC 24

Privy Council Appeal Nos 0043 of 2020

and 0073 of 2020

JUDGMENT

Broad Idea International Ltd (Respondent) v Convoy Collateral Ltd (Appellant) (British Virgin Islands)

Convoy Collateral Ltd (Appellant) v Cho Kwai Chee (also known as Cho Kwai Chee Roy) (Respondent) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Reed

Lord Hodge

Lord Briggs

Lord Sales

Lord Hamblen

Lord Leggatt

Sir Geoffrey Vos

JUDGMENT GIVEN ON

4 October 2021

Heard on 16 and 17 February 2021

Appellant	Respondent (1)
Paul McGrath QC	Richard Morgan QC
Jonathan Addo	Rosalind Nicholson
Julie Engwirda	Andrew McLeod
Jose Maurellet SC	
(Instructed by Harney Westwood & Riegels LLP (London))	(Instructed by Blake Morgan LLP (Oxford))

Responden

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Respondents:-

(1) Broad Idea International Ltd

(2) Cho Kwai Chee

LORD LEGGATT: (with whom Lord Briggs, Lord Sales and Lord Hamblen agree)

Introduction

1.
In his dissenting judgment in Mercedes Benz AG v Leiduck [1996] AC 284 at p 314D, Lord Nicholls of Birkenhead said:

“The law took a wrong turning in The Siskina, and the sooner it returns to the proper path the better.”

On these appeals the appellant, Convoy Collateral Ltd (“CCL”), asks the Board to return the law to what it submits is the proper path by holding that:

i)
under the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (the “EC CPR”) the court has power to authorise service on a defendant outside the jurisdiction of a claim form in which a freezing injunction is the only relief sought; and

ii)
where the High Court of the British Virgin Islands (“BVI”) has personal jurisdiction over a party, the court has power to grant a freezing injunction against that party to assist enforcement through the court’s process of a prospective (or existing) foreign judgment.

2.
To accept the first of these propositions would require the Board to depart not only from the decision of the House of Lords in Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA (“The Siskina”) [1979] AC 210, to which Lord Nicholls was referring in Mercedes Benz, but also from the Board’s decision - from which Lord Nicholls dissented - in the Mercedes Benz case itself. In the Board’s view, those decisions should not now be disturbed. The EC CPR must be interpreted by reference to them and, if a wrong turning has been taken, the appropriate means of getting the law of the BVI back on track is by amending the EC CPR. It follows that CCL’s appeal from the decision of the Court of Appeal of the Eastern Caribbean Supreme Court (the “EC Court of Appeal”) that the BVI court had no power to permit service of a claim form on the second respondent (“Dr Cho”) outside the BVI must fail.

3.
The second proposition contended for, on the other hand, in the Board’s opinion already represents the law of the BVI (and other jurisdictions where courts have inherited the equitable powers of the former Court of Chancery). In connection with proceedings against Dr Cho in Hong Kong, the judge at first instance granted a freezing injunction against the first respondent (“Broad Idea”), a BVI

company. As its main reason for allowing Broad Idea's appeal, the EC Court of Appeal held - contrary to its own previous conclusion on the issue in Yukos CIS Investments Ltd v Yukos Hydrocarbons Investments Ltd (HCVAP 2010/028) (unreported) 26 September 2011 - that a BVI court has no power to grant a freezing injunction against a BVI company except as ancillary to proceedings for substantive relief brought in the BVI. The EC Court of Appeal acknowledged that this conclusion may be perceived as "undesirable … in modern day international commerce," but considered it ineluctable on the authority of The Siskina without legislation in the BVI specifically conferring a broader power. That reasoning, in the Board's opinion, was in error. It failed to recognise the breadth of the power to grant injunctions already possessed by the BVI courts, the fact that the limit on the court's power which the EC Court of Appeal derived from The Siskina was not part of the ratio decidendi of that case, and how the law relating to injunctions generally - and freezing injunctions in particular - has developed in far-reaching ways since The Siskina was decided in 1977.

The Siskina

4.
The Siskina [1979] AC 210 was one of many shipping cases brought in the Commercial Court in London in the 1970s where the ability to recover money from a shipowner or charterer depended on finding and freezing assets against which a judgment could be enforced. As described by Kerr J, the judge at first instance, at p 216:

"The shipowners will usually be 'one ship' Panamanian or Liberian companies with no assets other than the ship itself, which may be difficult to arrest and may in any event be worth much less than the cargo. Sometimes there is then a game of hide and seek, as well as what may be described as asset hunting. … The essence of the battle is that every aggrieved party tries somehow, somewhere, to lay its hands on assets as security for what may be an unanswerable claim which the other party seeks to evade."

5.
The owners of The Siskina had contracted to carry a cargo of general merchandise from North Italy to Jeddah. However, instead of proceeding through the Suez Canal, the vessel discharged the cargo at Limassol in Cyprus. There the shipowners effectively held the cargo to ransom in a dispute with the charterers of the vessel - even though the freight had been pre-paid by the Saudi Arabian buyers (and owners) of the cargo. The difficulty for the cargo-owners of obtaining any effective remedy increased when The Siskina sank in Greek waters in unexplained circumstances and was a total loss. The only asset against which a judgment could potentially be enforced then became the proceeds of the policy of insurance of the vessel with London underwriters. As Lord Denning MR summarised the situation in his judgment in the Court of Appeal, at p 228:

"The shipowners are a 'one ship' company, whose one ship the Siskina is sunk beneath the waves. They have no other ship. They have no business and have no intention of carrying on any business. They have no assets except the insurance moneys of $750,000 payable by London underwriters for the loss of the Siskina.

… The cargo-owners want the insurance moneys of $750,000 retained in England - or a sufficient part of it - until their claim for damages is settled. Otherwise they are afraid - with good reason - that the $750,000 will be paid out to the shipowners and deposited in Switzerland, or in some foreign land: and the cargo-owners will have no chance of getting anything for all the damage they have suffered."

6.

Only the year before, in response to cases of a similar kind, the English courts had devised what Kerr J (at p 216 in The Siskina) described as the “recent and extremely useful practice” of granting an interim injunction - called after one of those cases a “Mareva injunction” - to restrain a foreign defendant from removing assets from the jurisdiction where there were grounds for believing that the defendant would otherwise do so and thereby frustrate the execution of a future judgment against it. In those cases, however, the injunction had been sought in proceedings claiming a money judgment in England. What was new in the case of The Siskina was that, although the shipowners’ only asset was in England, the claim for damages against them lay in a foreign court.

7.
Before an injunction could be granted, it was first of all necessary to find a ground on which jurisdiction of the English court over the shipowners could be established by the service of a writ. The cargo-owners relied for this purpose on RSC Order 11, rule 1(1)(i), which permitted service of a writ out of the jurisdiction with leave of the court:

“if in the action begun by the writ an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);”

Permission to serve such a writ was granted, but the owners of the Siskina applied to set it aside. Their argument was that sub-rule (i) did not apply to an injunction sought as an interim measure but only to an injunction which was part of the substantive relief claimed in “the action begun by the writ”. At first instance Kerr J accepted this argument. His decision was reversed by the Court of Appeal (Lord Denning MR and Lawton LJ, with Bridge LJ dissenting), but was restored by the House of Lords. Lord Denning afterwards wrote that, although well used to reversals by the House of Lords, they were “never so disappointing as this one”, particularly because he felt the decision was unjust to the buyers of cargo in the Middle East: see Denning, Due Process of Law (1980), p 141.

8.
Lord Diplock, with whose speech the rest of the appellate committee of the House of Lords agreed, interpreted sub-rule (i) as referring only to a final injunction which was part of the substantive relief sought in “the action”, and not as including an interlocutory injunction which was merely ancillary and incidental to the substantive relief claimed. It was in construing the language of the sub-rule that Lord Diplock said, at p 256:

“The words used in sub-rule (i) are terms of legal art. The sub-rule speaks of ‘the action’ in which a particular kind of relief, ‘an injunction’ is sought. This pre-supposes the existence of a cause of action on which to found ‘the action’. 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.”

9.
To decide whether the term “injunction” in sub-rule (i) could include a freezing injunction, which was the only issue in the appeal, it was not necessary to consider more fundamental questions about the powers of the court to grant a freezing injunction against a defendant on whom a writ had been properly served, and Lord Diplock thought it inappropriate to do so. He said, at p 254:

“… I do not think that the instant appeal provides an appropriate vehicle to carry your Lordships into a consideration of the wider question of what restrictions, whether discretional or jurisdictional, there

may be upon the powers conferred upon the High Court by section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 to:

‘grant a mandamus or an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do.’”

Nevertheless, in the next sentence Lord Diplock went on to say:

“That subsection, 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.”

Lord Diplock also said later in his speech, at p 256:

“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 LJ in North London Railway Co v Great Northern Railway Co (1883) 11 QBD 30, 39-40, which has been consistently followed ever since.”

10.
In summary, what the House of Lords decided in The Siskina was that the term “injunction” in sub-rule (i) referred only to an injunction sought in “the action” as final, substantive relief for the invasion by the defendant of a legal or equitable right of the plaintiff (whether or not damages were also claimed). The term did not include a freezing injunction or other interlocutory injunction. Although not necessary to the decision, however, and although Lord Diplock said in terms that the appeal was not an appropriate vehicle for considering wider questions about the scope of the court’s powers, there are statements in his speech to the effect that the High Court has no power to grant an interlocutory injunction unless it is ancillary to a cause of action, in the sense of a claim for final, substantive relief which the court has jurisdiction to grant.

Subsequent developments in the grant of freezing injunctions

11.
At the time when The Siskina was decided, freezing injunctions were in their infancy (cf Fourie v Le Roux [2007] UKHL 1; [2007] 1 WLR 320, para 30). There was recognised to be a pressing practical need for such a remedy, but a satisfactory theoretical foundation for it had yet to be found. This is evident from, among other things, the supposed limitation that a freezing injunction could not be granted against a defendant who was in England and Wales: see eg Gebr Van Weelde Scheepvaart Kantoor BV v Homeric Marine Services (The Agrabele) [1979] 2 Lloyd’s Rep 117. That supposed limitation is reflected in Lord Diplock’s description of a Mareva injunction in The Siskina [1979] AC 210, at p 253E, as “designed to prevent the judgment against a foreign defendant for a sum of money being a mere brutum fulmen” (emphasis added). Lord Hailsham of St Marylebone, in a concurring speech, suggested that this distinction could not be maintained (see p 261). Soon afterwards, it was held that the Mareva jurisdiction was not confined to foreign defendants: see Barclay-Johnson v Yuill [1980] 1 WLR 1259, 1264-1265 (Sir Robert Megarry V-C); approved by the Court of Appeal in Prince Abdul Rahman bin Turki al Sudairy v Abu-Taha [1980] 1 WLR 1268, 1272. The reasoning in these cases was that the “heart and core of the Mareva injunction” was the risk of the defendant removing

assets from the jurisdiction and so stultifying any judgment; and this risk could exist regardless of where the defendant was resident or situated.

12.
The position was confirmed in section 37 of (what is now) the Senior Courts Act 1981 (the "1981 Act"). Section 37(1) replaced section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 (the "1925 Act"), referred to in The Siskina, and states that: "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so." Section 37(3) specifically provides that the power under subsection (1) to grant an interlocutory injunction restraining a party from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction "shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction".

13.
The law and practice regarding the grant of freezing injunctions has subsequently developed in many other ways which have gone far beyond the nascent practice which existed in 1977. Four major developments are relevant to this appeal.

14.
First, it became established that a freezing injunction may be granted or continued to aid enforcement of a judgment which has already been given against the defendant. This was first decided by Robert Goff J in Stewart Chartering Ltd v C & O Managements SA (Practice Note) [1980] 1 WLR 460 and such injunctions soon became commonplace. In Jet West Ltd v Haddican [1992] 1 WLR 487 the Court of Appeal applied the principle to grant a freezing injunction in support of an order for costs made in favour of the defendant. Plainly, such an injunction does not fall within the description of an interlocutory injunction ancillary to a cause of action, as an order to be paid costs incurred in successfully defending a claim is not a form of substantive relief for which an action could have been brought.

15.
Second, it was held that a freezing injunction may be granted against a "non-cause of action defendant" - that is to say, a person against whom the applicant has no right to claim substantive relief. The basis for granting the injunction is that the person injuncted holds or controls assets against which a judgment against the primary defendant could potentially be enforced. The jurisdiction to make such orders is sometimes referred to as the "Chabra" jurisdiction after the case of TSB Private Bank International SA v Chabra [1992] 1 WLR 231, where Mummery J granted a freezing injunction against a company which held assets that were (arguably) beneficially owned by Mr Chabra, the defendant to the claim.

16.
In Mercantile Group (Europe) AG v Aiyela [1994] QB 366 the Court of Appeal rejected an argument that the Chabra case was wrongly decided. Hoffmann LJ, with whom Steyn LJ and Sir Thomas Bingham MR agreed, upheld a decision (of Hobhouse J) to grant a freezing injunction against the wife of a judgment debtor where no substantive claim had been made against her but there was good reason to suppose that she was holding assets on trust for her husband. The injunction granted in this case accordingly combined the features of being granted both after judgment was given and against a person against whom no cause of action existed (or had existed). The exercise of the jurisdiction to

grant freezing injunctions against third parties has since continued to evolve and is now the subject of a substantial body of case law: see eg Gee, Commercial Injunctions, 7th ed (2020), chapter 13.

17.
A third major step was taken by Parliament in the UK before the matter had been directly considered by the courts. To ensure compliance with article 24 of the Brussels Convention on the enforcement of judgments in civil and commercial matters, section 25(1) of the Civil Jurisdiction and Judgments Act 1982 (the "1982 Act") was enacted so as to provide that the High Court in England and Wales "shall have power to grant interim relief … where proceedings have been or are to be commenced in a Contracting State …". Section 25(1) was brought into force in 1987 and at the same time the rules of court were amended to permit service of a writ out of the jurisdiction "where a claim is made for an interim remedy under section 25(1) of the [1982 Act]". Section 25(3) made provision for the power conferred by section 25(1) to be extended by Order in Council to other proceedings; and in 1997 it was so extended to proceedings commenced or to be commenced anywhere in the world.

18.
The power conferred by section 25(1) of the 1982 Act is of enormous breadth. It has even been exercised to grant a worldwide freezing injunction in connection with foreign proceedings against a foreign defendant with no known assets in England and Wales: see Republic of Haiti v Duvalier [1990] 1 QB 202 (where the only link with England and Wales was the fact that the defendant had used the services of an English solicitor).

19.
The practice of granting worldwide freezing injunctions was a fourth major development. The argument for it had been made by Hoffmann J in Bayer AG v Winter (No 2) [1986] FSR 357, 362, when he said that, in a case where the defendant may have insufficient assets in England to satisfy a judgment:

"… the underlying policy of the Mareva injunction - to prevent a defendant from disposing of his assets in order to frustrate the execution of any judgment which the plaintiff may obtain - would suggest that this court should try to make its ultimate judgment effective by assisting the plaintiff to take steps to prevent the defendant from disposing of his assets in foreign jurisdictions as well. … It would be a pointless insularity for an English court to put obstacles in the way of a plaintiff who wished, with the aid of foreign courts, to enforce an English judgment against a defendant's assets wherever they might be."

It may be said that, by the same token, it would be unjustifiable insularity for an English or other domestic court to put obstacles in the way of a claimant who wishes, with the court's aid, to enforce a foreign judgment against a defendant's assets.

20.
In Ashtiani v Kashi [1987] QB 888 the Court of Appeal held that it would be contrary to settled practice to grant a freezing injunction which applied to assets abroad. But only two years later the view expressed by Hoffmann J in Bayer AG v Winter (No 2) was accepted. In a trilogy of cases in 1988, the Court of Appeal decided: (i) that, provided the court has personal jurisdiction over the defendant, there is power under section 37(1) of the 1981 Act to grant a freezing injunction covering assets of the defendant wherever in the world such assets are situated; (ii) that the practice governing the exercise of this power was in a state of development and could be altered as circumstances change; and (iii) that it might exceptionally be appropriate to grant a freezing injunction, either post-judgment or pre-judgment, in relation to assets worldwide: see Babanaft International Co SA v Bassatne [1990]

Ch 13; Republic of Haiti v Duvalier [1990] 1 QB 202; Derby & Co Ltd v Weldon (No 1) [1990] Ch 48; and Derby & Co Ltd v Weldon (Nos 3 and 4) [1990] Ch 65. The grant of such injunctions has long since ceased to be exceptional.

21.
In the last of these cases, Neill LJ observed, at p 92, that:

"… the practice as to the grant of Mareva injunctions is still in the course of development. Having regard to the changes in the practice which have already taken place since 1975 I see no good reason for saying that a practice which has so recently come into existence has already become ossified. Circumstances change. … The transfer of funds from one jurisdiction to another grows ever more speedy and the methods of transfer more sophisticated."

Neill LJ went on to cite a passage in Halsbury's Laws of England, 3rd ed, vol 21 (1957), para 729, to which Lord Denning MR had referred in the Mareva case (see Mareva Cia Naviera SA v International Bulk Carriers SA [1975] 2 Lloyd's Rep 509, 510), for the proposition that:

"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 [section 45 of the 1925 Act], in a proper case, to grant an injunction to protect that right."

Neill LJ identified the right which a freezing injunction is granted to protect as the right to enforce a future judgment of the court for the payment of a sum of money. He concluded, at p 93:

"It seems to me that the time has come to state unequivocally that in an appropriate case the court has power to grant an interlocutory injunction even on a worldwide basis against any person who is properly before the court, so as to prevent that person by the transfer of his property frustrating a future judgment of the court. …

In matters of this kind it is essential that the court should adapt the guidelines for the exercise of a discretion to meet changing circumstances and new conditions provided always the court does not exceed the jurisdiction which is conferred on it by Parliament or by subordinate legislation."

Later decisions of the House of Lords

22.
In the decade after The Siskina was decided, Lord Diplock's dicta in that case were referred to in a number of decisions of the House of Lords in cases where injunctions were sought to restrain parties from continuing proceedings before arbitrators or foreign courts.

23.
In Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd [1981] AC 909, the House of Lords held (by a majority of 3 to 2) that a party to an arbitration agreement did not have a legal or equitable right enforceable by injunction to restrain the other party from proceeding with an arbitration following inordinate, inexcusable and prejudicial delay. In the course of giving the reasons of the majority, Lord Diplock said, at p 979G-H, that in The Siskina the House of Lords "had occasion to confirm as a matter of ratio decidendi the well-established law that the jurisdiction of the High Court to grant injunctions, whether interlocutory or final, was confined to injunctions granted for the enforcement or protection of some legal or equitable right." While the assertion that this was "a matter of ratio decidendi" is hard to support, it may be noted that this proposition is narrower than some of the dicta in The Siskina. In particular, it does not repeat the assertion that an interlocutory

injunction can only be granted in aid of a claim for substantive relief which the court has jurisdiction to grant.

24.
In Castanho v Brown & Root (UK) Ltd [1981] AC 557 the defendant sought to prevent the plaintiff from discontinuing a personal injury claim commenced in England and from suing the defendant instead in Texas, where higher damages could potentially be obtained. Counsel for the plaintiff submitted that the power to grant an injunction to restrain foreign proceedings is exercisable only in two classes of case: (1) where the object is to prevent harassment; and (2) where there is a right justiciable in England, which the court seeks to protect. In support of his second class, counsel relied on The Siskina. Lord Scarman (who gave the only reasoned speech with which the other law lords, including Lord Diplock, agreed) rejected the notion that there is any such limitation upon the sort of cases in which it may be appropriate to exercise the power. He said at p 573:

“No doubt, in practice, most cases fall within one or other of these two classes. But the width and flexibility of equity are not to be undermined by categorisation. Caution in the exercise of the jurisdiction is certainly needed: but the way in which the judges have expressed themselves from 1821 onwards amply supports the view for which the defendants contend that the injunction can be granted against a party properly before the court, where it is appropriate to avoid injustice.”

25.
In British Airways Board v Laker Airways Ltd [1985] AC 58, 81, Lord Diplock acknowledged that his statement of the law in The Siskina needed to be qualified to accommodate a claim, of the kind made by Laker, for an anti-suit injunction based on a legal or equitable right not to be sued by the respondent in a foreign court. Lord Diplock also reiterated his agreement with the statement of Lord Scarman in Castanho quoted above. Lord Scarman (with whose speech, as well as that of Lord Diplock, the other law lords agreed) also referred to his previous statement in Castanho and identified as “in accordance with our principles of a ‘wide and flexible’ equity” an equitable right not to be sued abroad which arises “if the inequity is such that the English court must intervene to prevent injustice” (see p 95).

26.
In South Carolina Insurance Co v Assurantie Maatschappij “De Zeven Provincien” NV [1987] AC 24, another case involving an application for an anti-suit injunction, Lord Brandon of Oakbrook summarised the effect of the earlier authorities as being that the power of the High Court to grant injunctions is limited to two situations: (1) where it is shown that the respondent has either invaded, or threatens to invade, a legal or equitable right of the applicant for the enforcement of which the latter is amenable to the jurisdiction of the court; and (2) where the respondent to the application has behaved, or threatens to behave, in a manner which is unconscionable. To this classification Lord Brandon went on to specify two exceptions - the first being the power to grant an injunction to restrain foreign proceedings on the ground of forum non conveniens and the second being the power to grant freezing injunctions. While Lord Bridge of Harwich and Lord Brightman agreed without reservation with Lord Brandon’s speech, Lord Goff of Chieveley (with whom Lord Mackay of Clashfern agreed) was unwilling to accept that the power of the court to grant injunctions is restricted to certain exclusive categories, stating (at p 44G):

“That power is unfettered by statute; and it is impossible for us now to foresee every circumstance in which it may be thought right to make the remedy available.”

Channel Tunnel

27.
A milestone in the development of the relevant law was the decision of the House of Lords in Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334. The claimants, who had employed the defendant contractors to build the Channel tunnel, brought an action seeking an injunction to restrain the defendants from suspending work. The defendants applied for the action to be stayed on the ground that the dispute was one which the parties had agreed to arbitrate. The Court of Appeal granted a stay which the House of Lords upheld. One issue was whether in this situation, where the action had been stayed in favour of arbitration, the court had power under section 37(1) of the 1981 Act to grant an interlocutory injunction to restrain the suspension of work pending the decision of the arbitrators. The House of Lords held that there was such power, although it was not appropriate to exercise it on the facts of that particular case. The importance of the decision for present purposes lies in the rejection of the defendants' argument, founded on Lord Diplock's remarks in The Siskina, that the court was precluded from granting an interlocutory injunction because it was not sought in aid of a claim for substantive relief which the court had jurisdiction to grant.

28.
Lord Browne-Wilkinson (with whose judgment Lord Keith of Kinkel and Lord Goff agreed) expressed concern that the defendants' argument, if correct, "would have the effect of severely curtailing the powers of the English courts to act in aid, not only of foreign arbitrations, but also of foreign courts." He continued, at p 341:

"Given the international character of much contemporary litigation and the need to promote mutual assistance between the courts of the various jurisdictions which such litigation straddles, it would be a serious matter if the English courts were unable to grant interlocutory relief in cases where the substantive trial and the ultimate decision of the case might ultimately take place in a court outside England."

That result was avoided by distinguishing The Siskina on the ground that, in the words of Lord Browne-Wilkinson at p 343:

"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 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."

It is clear from the discussion preceding this conclusion that, in referring to "a cause of action recognised by English law," Lord Browne-Wilkinson did not mean to suggest that the claim for final relief had to arise under English law (as opposed to foreign law) but only that it had to be one which the English court would regard as legally sustainable.

29.
Lord Browne-Wilkinson also made it clear that he shared the doubts expressed by Lord Goff in South Carolina about the notion that the power of the court to grant injunctions is restricted to certain exclusive categories: see p 343E-F.

30.
Lord Mustill (who gave the only other reasoned speech) reached a similar conclusion on the power to grant an injunction in aid of foreign proceedings. He proceeded, at p 362, on the footing that:

“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 dependant on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action. If the underlying right itself is not subject to the jurisdiction of the English court, then that court should never exercise its power under section 37(1) [of the 1981 Act] by way of interim relief.”

Lord Mustill held, at p 363, that, in order for the underlying right to be subject to the jurisdiction of the English court in the relevant sense, it did not matter that any action brought in the English court claiming substantive relief had been or would inevitably be stayed: it was sufficient that there was a ground on which the respondent could be served with a writ under (what was then) RSC Order 11. Lord Mustill described the absence of a pending suit as “an irrelevance”. He also rejected, at pp 363H-364C, an argument that the statutory provision in section 25(3) of the 1982 Act to extend the power to grant interim relief under section 25(1) to arbitration proceedings (see para 17 above) shed any light on the extent of the court’s powers under the existing law.

31.
The Channel Tunnel case is thus authority for the proposition that, provided the court has personal jurisdiction over a party, the court has power under section 37(1) of the 1981 Act to grant an interlocutory injunction against that party where the injunction is ancillary to a claim for substantive relief being pursued in arbitration proceedings or in a foreign court.

Mercedes Benz

32.
In common law jurisdictions where legislation comparable to section 25(1) of the 1982 Act and a corresponding amendment to the procedural rules governing service of proceedings abroad have not been introduced, questions about the territorial reach of the power to grant freezing injunctions have continued to arise. Such questions arose in Mercedes Benz AG v Leiduck [1996] AC 284. Mercedes claimed to have been defrauded by Mr Leiduck and brought proceedings against him in Monaco where he was situated. Mercedes then applied for a freezing injunction in Hong Kong where Mr Leiduck had assets. As Lawrence Collins wrote in a comment on the case in the Law Quarterly Review:

“Common sense would suggest that if proceedings are pending in one country, and the defendant’s assets are situate in another country, the plaintiff ought to be able to obtain protective or interim relief by way of attachment in the latter country. That is indeed the law in most countries …”

See Collins, “The Siskina again: an opportunity missed” (1996) 112 LQR 8. Yet the attempt to obtain a freezing injunction in Hong Kong failed. An appeal to the Board was dismissed (with Lord Nicholls dissenting) for the same reason as had frustrated the attempt to obtain a freezing injunction in The Siskina: that is, the absence of a rule of court which would allow service of a writ out of the jurisdiction if the only claim made in the action begun by the writ was for an interim injunction.

33.
In seeking leave to serve a writ on the defendant in Monaco, Mercedes relied on a provision of the Hong Kong rules that was identically worded to RSC Order 11, rule 1(1)(i) of the English rules of court (quoted at para 7 above) on which the cargo-owners had relied unsuccessfully in The Siskina. The majority of the Board followed the decision of the House of Lords in The Siskina in holding that the relevant sub-rule applied only to a final and not an interim injunction. Having reached that conclusion, Lord Mustill (who gave the majority judgment) preferred to express no conclusion on the

question whether, if the defendant had been properly served with a writ, the Hong Kong court would have had power to grant a freezing injunction in support of a claim being pursued against him in a foreign court.

34.
What makes Lord Nicholls' dissenting judgment of enduring relevance is not his interpretation of the Hong Kong rules of court, which did not prevail, but his illumination of the nature and purpose of a freezing injunction. Lord Nicholls spelt out a principled basis for the practice of granting freezing injunctions which, until then, the courts had been struggling to articulate. His key point was that the essential purpose of a freezing injunction is to assist the enforcement through the court's process of a money judgment (which is usually prospective): the claimant's underlying cause of action is relevant only in so far as it bears on the prospect that such a judgment will be obtained. As Lord Nicholls said (at p 306):

"Although normally granted in the proceedings in which the judgment is being sought, Mareva relief is not granted in aid of the cause of action asserted in the proceedings, at any rate in any ordinary sense. It is not so much relief appurtenant to a money claim as relief appurtenant to a prospective money judgment. It is relief granted to facilitate the process of execution or enforcement which will arise when, but only when, the judgment for payment of an amount of money has been obtained. The court is looking ahead to that stage, and taking steps designed to ensure that the defendant cannot defeat the purpose of the judgment by thwarting in advance the efficacy of the process by which the court will enforce compliance."

35.
This rationale was not directly addressed in the majority judgment, where Lord Mustill examined (at pp 299F-301F) various rationalisations put forward in the cases for granting Mareva injunctions and found them all wanting, ending by saying that "at present … [t]he most that can be said is that whatever its precise status the Mareva injunction is a quite a different kind of injunction from any other." Lord Mustill nevertheless referred later (at p 304G-H) to Lord Nicholls' dissent and expressly contemplated the possibility that, in a future case where the question arose for decision, Lord Nicholls' analysis might prevail.

36.
Lord Nicholls' explanation of the nature of a freezing injunction quoted at para 34 above has since been adopted as a correct statement of principle by the High Court of Australia: see Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (1998) 195 CLR 1, para 35; Cardile v Led Builders Pty Ltd (1999) 198 CLR 380, para 41; PT Bayan Resources TBK v BCBC Singapore Pte Ltd (2015) 258 CLR 1, para 46.

Fourie v Le Roux

37.
When the House of Lords next considered the power to grant freezing injunctions in Fourie v Le Roux [2007] UKHL 1; [2007] 1 WLR 320, Lord Nicholls' analysis in Mercedes Benz was not expressly mentioned. But it finds support in the statement of Lord Bingham of Cornhill that the "important but limited purpose" for which freezing injunctions are granted is "to prevent a defendant dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment" (para 2). Lord Bingham went on to underscore as an "important safeguard" the need for the claimant to identify the prospective judgment whose enforcement the defendant is not to be permitted, by dissipating its assets, to frustrate. He said, at para 3:

“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.”

There is no suggestion in this account that a freezing injunction is dependent on or ancillary to a pre-existing cause of action: the focus is entirely on the prospect of recovering a judgment and the need to identify proceedings (actual or anticipated) is treated as a practical requirement designed to protect the defendant against having his assets frozen unnecessarily and not as a limitation on the court’s power.

38.
To similar effect Lord Scott of Foscote, who gave the main speech with which the other law lords agreed, held that, although there had been power to grant a freezing injunction in that case, the injunction had rightly been discharged because no claim for substantive relief had been formulated and no undertaking to institute proceedings given when the application was made, as good practice required: see paras 32-37. In considering the extent of the court’s power, Lord Scott (at paras 25-30) reviewed the line of authority on the equitable jurisdiction of the court to grant interim injunctions starting from The Siskina and ending with Channel Tunnel. The following three points made by Lord Scott in this review deserve emphasis.

39.
First, it is necessary to distinguish between the power of the court to grant an injunction and the principles and practice governing the exercise of the power. The power exists whenever the court has personal jurisdiction over the party against whom an injunction is sought. Like any judicial power, however, the power to grant an injunction must be exercised in accordance with principle and any restrictions established by judicial precedent and rules of court.

40.
Second, although the power of the High Court of England and Wales to grant injunctions is now embodied in section 37(1) of the 1981 Act, that provision (like its statutory predecessors) merely confirms and restates powers of the Chancery (and common law) courts to grant injunctions which existed before the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) (the “1873 Act”) and still exist. Those powers were transferred to the High Court by section 16 of the 1873 Act and have been preserved by section 18(2) of the 1925 Act and section 19(2)(b) of the 1981 Act.

41.
Third, the principles and practice governing the exercise of the power to grant injunctions need to and do evolve over time as circumstances change.

42.
From his review of the authorities, Lord Scott drew the conclusion, at para 30, that:

“… provided the court has in personam jurisdiction over the person against whom an injunction, whether interlocutory or final, is sought, the court has jurisdiction, in the strict sense, to grant it.”

As for the manner in which the power should be exercised:

“The practice regarding the grant of injunctions, as established by judicial precedent and rules of court, has not stood still since The Siskina [1979] AC 210 was decided and is unrecognisable from the practice to which Cotton LJ was referring in North London Railway Co v Great Northern Railway Co

(1883) 11 QBD 30, 39-40 and to which Lord Diplock referred in The Siskina at p 256. Mareva injunctions could not have been developed and become established if Cotton LJ's proposition still held good."

North London Railway

43.
Cotton LJ's judgment in North London Railway Co v Great Northern Railway Co (1883) 11 QBD 30, referred to in this passage and by Lord Diplock in The Siskina and Bremer Vulkan, considered the effect of section 25(8) of the 1873 Act - the predecessor provision of section 45(1) of the 1925 Act, section 37(1) of the 1981 Act and, in the BVI, section 24(1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act (the "BVI Act"). Section 25(8) of the 1873 Act stated:

"A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made; …"

44.
The question in North London Railway was whether the High Court had been entitled to grant an injunction to restrain the defendant from proceeding with a claim in arbitration to decide a matter which was the subject of litigation between the parties. The plaintiff sought to uphold the injunction on the ground that it was clear that the dispute was not within the scope of the arbitration agreement: hence any award made by the arbitrators could not be binding and, if allowed to proceed, the arbitration would be futile and vexatious. The Court of Appeal (Brett and Cotton LJJ) allowed the defendant's appeal. Their reasoning, in summary, was that, before the 1873 Act, no court would have considered that going on with the arbitration would infringe any legal or equitable right of the plaintiff. Section 25(8) of the 1873 Act, despite its wide wording, was not intended to dispense with the need to point to a legal or equitable right which an injunction would protect, but only to ensure that, where there was such a right capable of being enforced independently of the Act, the High Court could grant an injunction to protect the right where it was just or convenient to do so. As there was no such right in that case, there was no ground for granting an injunction.

45.
In some later cases North London Railway was taken to have decided that section 25(8) of the 1873 Act did not enable the court to grant an injunction or appoint a receiver in circumstances where the court could not have done so before the 1873 Act. But in Masri v Consolidated Contractors International (UK) Ltd (No 2) [2008] EWCA Civ 303; [2009] QB 450 Lawrence Collins LJ showed that this view was based on a misunderstanding of North London Railway and that the court is not bound by pre-1873 practice to abstain from incremental development of the law as circumstances change. That analysis was adopted by the Board in Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd [2011] UKPC 17; [2012] 1 WLR 1721, para 56.

46.
The potential for such development is illustrated by the subsequent history of the particular practice followed in North London Railway itself. In Kitts v Moore [1895] 1 QB 253 the Court of Appeal held that an injunction to restrain arbitration proceedings could be granted where the validity of the arbitration agreement was challenged: North London Railway was distinguished on the ground it had not involved such a challenge to the validity of the arbitration agreement. It is difficult to see a material distinction between a case where the arbitration agreement allegedly does not apply because it is invalid and a case where (as in North London Railway) it allegedly does not apply because the

dispute is outside its scope. In Government of Gibraltar v Kenney [1956] 2 QB 410 North London Railway was further distinguished on the basis that, even if an injunction could not be granted, the court could make a declaration that the dispute was not within the scope of the arbitration agreement.

47.
In Bremer Vulkan [1981] AC 909, p 924, Donaldson J described the distinctions drawn in the authorities as “very strange”, although on the appeal to the House of Lords Lord Diplock mentioned them (at p 981) without disapproval. Since then, beginning with the decision of Hobhouse J in Compagnie Européene de Céréals v Tradax Export [1986] 2 Lloyd’s Rep 301, the earlier distinctions have been discarded and the approach to granting injunctions to restrain arbitration proceedings has been assimilated with the approach to anti-suit injunctions (save that anti-arbitration injunctions will be granted somewhat more readily, as no question of interference with a foreign court is involved). In consequence, it is now established that, although great caution should be exercised, it is open to the court in principle to grant an injunction to restrain a party from proceeding with an arbitration on the ground that to do so would be vexatious and oppressive: see Claxton Engineering Services Ltd v TXM Olaj-és Gázkutató Kft (No 2) [2011] EWHC 345 (Comm); [2011] 2 All ER (Comm) 128 (Hamblen J); Sabbagh v Khoury [2019] EWCA Civ 1219; [2020] Bus LR 724 (CA).

Third party disclosure orders

48.
The practice regarding the grant of injunctions has moved on in other ways since The Siskina was decided. In addition to freezing injunctions, which - as Lord Scott noted in Fourie v Le Roux (see para 42 above) - could not have been developed and become established if the approach in North London Railway still held good, another major new type of injunction which the courts have developed is the third party disclosure order. In accordance with the principle recognised by the House of Lords in Norwich Pharmacal Co v Customs and Excise Comrs [1974] AC 133, a third party who gets mixed up in wrongdoing, even innocently, may be ordered to provide relevant information in its possession which the applicant needs in order to seek redress. It is not necessary that the party ordered to provide information should have invaded or threatened to invade any right of the claimant. The party may be entirely innocent. Although it was said in Norwich Pharmacal that the third party had a “duty” to disclose information, as Lord Kilbrandon observed (at p 205) citing a South African decision, the duty lies “rather on the court to make an order necessary to the administration of justice than on the respondent to satisfy some right existing in the plaintiff”; and see Cartier International AG v British Sky Broadcasting Ltd (Open Rights Group intervening) [2018] UKSC 28; [2018] 1 WLR 3259, para 11. Nor is it even a precondition of the exercise of the jurisdiction that the applicant should have brought, or be intending to bring, legal proceedings against the alleged wrongdoer. It is sufficient that the applicant intends to seek some form of lawful redress for which the information is needed: see Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29; [2002] 1 WLR 2033.

49.
Closely related to such orders are injunctions of the type granted in Bankers Trust Co v Shapira [1980] 1 WLR 1274 whereby an innocent third party - typically a bank - is ordered to disclose documents or information to assist a claimant in locating assets to which the claimant has a proprietary claim. Such “Bankers Trust orders” are often sought alongside freezing injunctions. The rationale for them is that, unless the assets in question can be located and frozen, the ultimate determination of ownership of the assets is liable to be frustrated by their removal or dissipation. The cases have emphasised that, as with third party disclosure orders, the equitable jurisdiction to make such orders is a wide and flexible one: see eg Murphy v Murphy [1999] 1 WLR 282, 292; and Global

Energy Horizons Corpn v Gray [2014] EWHC 2925 (Ch), paras 72-75 (where Sales J ordered innocent third parties to disclose documents and information capable of showing, on the taking of an account of profits, that the defendant had derived a benefit from the diversion of a business opportunity in breach of fiduciary duty).

Website blocking orders

50.
More recently, a new type of injunction has been developed to combat problems posed by the infringement of intellectual property rights via the internet. In Cartier International AG v British Sky Broadcasting Ltd [2016] EWCA Civ 658; [2017] 1 All ER 700 the Court of Appeal upheld decisions of Arnold J to grant injunctions ordering internet service providers ("ISPs") to block websites selling counterfeit goods. The ISPs had not invaded, or threatened to invade, any independently identifiable legal or equitable right of the claimants. Nor had the claimants brought or indicated any intention to bring proceedings against any of the infringers. It was nevertheless held that there was power to grant the injunctions and a principled basis for doing so to compel the ISPs to prevent their facilities from being used to commit or facilitate a wrong. An analogy was drawn with third party disclosure orders.

51.
There was an appeal to the Supreme Court in Cartier though only on the question of costs. Nevertheless, in considering how the costs of complying with the injunctions should be dealt with, Lord Sumption (with whom the other Justices agreed) analysed the nature and basis of the website blocking orders made and concluded that they were justified "on ordinary principles of equity": Cartier International AG v British Sky Broadcasting Ltd [2018] 1 WLR 3259, para 15. That was so although the claimants had no cause of action against the respondent ISPs who were themselves innocent of any wrongdoing. The Supreme Court of Canada reached a similar conclusion in Google Inc v Equustek Solutions Inc 2017 SCC 34; [2017] 1 SCR 824.

A legal or equitable right?

52.
The proposition asserted by Lord Diplock in The Siskina and Bremer Vulkan on the authority of North London Railway was that an injunction may only be granted to protect a legal or equitable right. There can be no objection to this proposition in so far as it signifies the need to identify an interest of the claimant which merits protection and a legal or equitable principle which justifies exercising the power to grant an injunction to protect that interest by ordering the defendant to do or refrain from doing something. In Beddow v Beddow (1878) 9 Ch D 89, 93, Sir George Jessel MR expressed this well when he said that, in determining whether it would be right or just to grant an injunction in any case, "what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles." As described above, however, within a very short time after The Siskina was decided, it had already become clear that the proposition cannot be maintained if it is taken to mean that an injunction may only be granted to protect a right which can be identified independently of the reasons which justify the grant of an injunction.

53.
In Castanho v Brown & Root (UK) Ltd [1981] AC 557 and British Airways Board v Laker Airways Ltd [1985] AC 58, Lord Diplock himself acknowledged that his proposition formulated in The Siskina required qualification and endorsed Lord Scarman's dictum that "the width and flexibility of equity are not to be undermined by categorisation" (see paras 24 and 25 above). In Laker Airways the House

of Lords held that an injunction may be granted to restrain a party from suing the applicant in a foreign court if, in the words of Lord Scarman at p 95:

"… the bringing of the suit in the foreign court is in the circumstances so unconscionable that in accordance with our principles of a 'wide and flexible' equity it can be seen to be an infringement of an equitable right of the applicant. The right is an entitlement to be protected from a foreign suit the bringing of which by the defendant to the application is in the circumstances unconscionable and so unjust."

54.
As Lord Nicholls pointed out in Mercedes Benz, at p 310G, this reasoning is circular, in that the right which the injunction is granted to protect arises only in the circumstances which justify the grant of an injunction. This illustrates that, as it is put in Spry, Equitable Remedies, 9th ed (2014), p 343, there are cases where "on a strict analysis the right to the injunction itself represents pro tanto the equitable right in question." Another such case of an injunction which is not based on a distinct underlying right is an injunction granted to restrain the presentation or advertising of a winding-up petition where this would be an abuse of the process of the court: see eg Bryanston Finance Ltd v De Vries (No 2) [1976] Ch 63, 76.

55.
In South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV [1987] AC 24, 40 Lord Brandon attempted to accommodate such cases within an overarching scheme by identifying the protection of a legal or equitable right as only one situation in which an injunction may be granted, with a second situation being where a party "has behaved, or threatens to behave, in a manner which is unconscionable". The inadequacy of this classification is apparent, however, from the fact that Lord Brandon recognised two exceptions which did not fit into his two categories but did not explain the basis on which these (or any further) exceptions are justified. A similar attempt at categorisation had already been rejected by the House of Lords in Castanho and in Laker Airways, and the caution sounded by Lord Goff in South Carolina against attempting to restrict the cases in which injunctions can be granted to certain exclusive categories was subsequently repeated by the majority of the House of Lords in Channel Tunnel.

56.
Apart from freezing injunctions (which were one of Lord Brandon's exceptions), several further examples have already been mentioned (at paras 48-51 above) of injunctions which are not granted to protect an independently identifiable legal or equitable right or to restrain "unconscionable" conduct. As Kitchin LJ stated in Cartier International AG v British Sky Broadcasting Ltd [2017] 1 All ER 700, at para 46:

"It is clear … that matters have moved on since 1986 [when South Carolina was decided] and the courts have shown themselves ready to adapt to new circumstances by developing their practice in relation to the grant of injunctions where it is necessary and appropriate to do so to avoid injustice, just as Lord Goff anticipated."

57.
As an exposition of the court's equitable power to grant injunctions, it would be difficult to improve on the following passage in Spry, Equitable Remedies, 9th ed (2014), at p 333:

"The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable

principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate."

This passage (stated in the same terms in an earlier edition of Spry's book) was quoted in Broadmoor Special Health Authority v Robinson [2000] QB 775, para 20, by Lord Woolf MR, who described it as succinctly summarising the correct position. It was again quoted and endorsed as a correct statement of the law by Kitchin LJ (with whom Briggs and Jackson LJJ agreed on this point) in Cartier , para 47. The Board would likewise endorse it.

58.
In Cartier an attempt was made by counsel for the ISPs to argue that website blocking injunctions could not be granted because they do not fall within the categories recognised by Lord Diplock in The Siskina and Lord Brandon in South Carolina, as the ISPs had not invaded, or threatened to invade, any legal or equitable right of the claimants, nor had they behaved or threatened to behave in an unconscionable manner. The Court of Appeal firmly rejected that submission. Kitchin LJ said at para 54:

"In my judgment that would impose a straitjacket on the court and its ability to exercise its equitable powers which is not warranted by principle. As Lord Woolf explained [in Broadmoor], the preferable analysis involves a recognition of the great width of those equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate."

That analysis was implicitly endorsed by the Supreme Court on appeal when the court held that, although the ISPs were innocent parties who had not interfered with any right of the claimants (and as such, in agreement with the dissenting opinion of Briggs LJ on this issue, were entitled to be paid their costs of complying with the injunctions), the decision that injunctions may issue in this type of case was justified "on ordinary principles of equity". The correctness of what Spry refers to as "the preferable analysis" must, in the Board's view, now be regarded as settled.

Changing circumstances

59.
The developments in the practice of granting injunctions described above - including the expansion of freezing injunctions far beyond their original confines and the creation of other new types of injunction - illustrate the ability of courts with equitable powers to modify existing practice where to do so accords with principle and is necessary to provide an effective remedy. Such flexibility is essential if the law and its procedures are to keep abreast of changes in society. Recent decades have seen fundamental changes in commercial and financial practices, driven in large part by the revolution in information technology. The legal developments described above have been forged, often explicitly, in response to such changing circumstances.

60.
It is worth noting three major changes in circumstances since freezing injunctions were devised in the 1970s to which the practice of granting such injunctions has needed to adapt. One is the

transformation in the ease and speed with which money and other financial assets can be moved around the world. In the 1970s, the UK still had exchange controls restricting the transfer of funds out of the country and electronic banking lay far in the future. Today the international transfer of funds is easy and almost instantaneous. A second major and continuing trend is the globalization of commerce and economic activity and consequent growth of litigation and arbitration with international dimensions. The situation in The Siskina where a defendant's assets are situated in a country other than that in which the substantive proceedings are taking place was comparatively uncommon in commercial litigation in 1977 but is now normal. A third significant development is the growth in the use of offshore companies. The BVI is a popular jurisdiction for the location of such companies.

61.
The arguments in the present case about the powers and practice of the BVI courts as regards freezing injunctions need to be seen in this context. As Lord Neuberger of Abbotsbury MR said in Linsen International Ltd v Humpuss Transportasi Kimia [2011] EWCA Civ 1042, para 17:

"In the increasingly sophisticated world of international movement of goods, assets and money, and the formation of companies and the hiding of assets, the courts have to be astute to ensure that the law keeps pace with modern developments and is not flouted."

These appeals

62.
As mentioned at the start of this judgment, the first respondent, Broad Idea, is a company incorporated in the BVI. 50.1% of its shares are owned by the second respondent, Dr Cho, who is resident in Hong Kong. The other 49.9% of its shares are owned by Mr Francis Choi, an individual who is said in Forbes list to be the tenth richest billionaire in Hong Kong and who is not a party to these proceedings.

63.
The appellant, CCL, has brought proceedings in Hong Kong claiming damages and other substantive relief against Dr Cho and other defendants (who do not include Broad Idea). In the BVI, CCL applied for freezing injunctions against Dr Cho and against Broad Idea. Those applications were heard separately and resulted in separate appeals to the EC Court of Appeal, and from there to the Board. It is convenient to take first the appeal relating to Dr Cho.

The injunction sought against Dr Cho

64.
An order of the BVI court granting a freezing injunction against Dr Cho and permission to serve a claim form on him outside the BVI was set aside by Adderley J. The EC Court of Appeal dismissed CCL's appeal from that decision.

65.
This further appeal by CCL to the Board raises the same issue as was raised in The Siskina and Mercedes Benz. As in those cases, the obstacle facing CCL is to identify a provision in the applicable rules of court under which permission may be given to serve outside the territorial jurisdiction of the court a claim form in which the only relief claimed is a freezing injunction.

66.

Save that the EC CPR, which were introduced in 2000, use the modern terminology of “claimant” and “claim form” rather than “plaintiff” and “writ”, they are in materially similar terms to the English rules of court which were applicable in The Siskina and the Hong Kong rules which were applicable in Mercedes Benz. In particular, EC CPR rule 7.3(1)(b), on which CCL relies, allows a claim form to be served out of the jurisdiction “if a claim is made … for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction.”

67.
Whatever merit it might have had if the question was a new one, CCL’s argument that this rule encompasses a claim made for a freezing injunction comes far too late in the day. The common law does not operate on a principle of third time lucky. On the contrary, at its core is the doctrine of stare decisis, meaning “stand by what has been decided”. That doctrine remains as essential as ever to securing stability, consistency and predictability in the common law. The Board has never acted on a strict rule that it is bound by its own previous decisions, nor those of the House of Lords or Supreme Court; but the Board will not depart from a previous decision of its own or of the House of Lords or Supreme Court without compelling reason to do so: see Lord Mance and J Turner, Privy Council Practice (2017), paras 5.07 - 5.21 and the cases there cited. Such a reason is unlikely to be found where the question concerns the meaning of a rule of court. Where the meaning of such a rule has already been settled at the highest level of judicial authority, litigants should be entitled to rely on that meaning in the knowledge that there is a procedure readily available for amending the rules, if necessary. The use of that procedure is generally the fairest and most efficient means of ensuring that the rules of court are kept up to date. (See also in this respect the warning by Lord Hailsham in The Siskina [1979] AC 210, 262 that, in relation to any extension of the grounds for permitting service out of the jurisdiction, the courts should not usurp the functions of the Rules Committee.)

68.
The justice and convenience of interpreting a rule in accordance with a settled meaning is all the greater where, as in the present case, a rule in the same or materially similar terms exists in other jurisdictions for which the Board is or was the final court of appeal. For the Board to depart from the interpretation of the rule applicable to claims for injunctions which was adopted in The Siskina and in Mercedes Benz would have repercussions beyond the BVI and would potentially upset reasonable expectations and cause uncertainty about the effect of the corresponding rules in those other jurisdictions.

69.
A further and cogent consideration is that the decisions in The Siskina and Mercedes Benz formed part of the legal background against which the EC CPR were introduced in 2000. Where legislation re-enacts a provision which has been the subject of authoritative judicial interpretation, it is generally to be inferred that the new provision was intended to bear the meaning that case law had already established: see eg R (N) v Lewisham London Borough Council [2014] UKSC 62; [2015] AC 1259, para 53 (Lord Hodge). This presumption applies with all the more force where that case law included two decisions at the highest level. EC CPR rule 7.3(1)(b) replaced without material alteration in wording Order 11, rule 1(i) of the Rules of the Supreme Court (Revision) 1970 (BVI), which was itself in identical terms to the rules construed in The Siskina and Mercedes Benz. The overwhelming inference in these circumstances is that EC CPR rule 7.3(1)(b) was intended to have the same meaning and effect as was given to its predecessor by the House of Lords and the Board.

70.

For these reasons, the Board would affirm the decision of both courts below that Dr Cho cannot be brought within the jurisdiction of the BVI court by serving him with a claim form abroad. The lacuna in the EC CPR can only be filled by amending the rules and not by reinterpreting them. Having reached that conclusion, Adderley J and the EC Court of Appeal did not address the question whether, if he had been subject to the court's jurisdiction, a freezing injunction could or should have been granted against Dr Cho; and on the basis that their conclusion was correct, it is neither necessary nor appropriate to consider that question for the first time on this appeal.

The injunction sought against Broad Idea

71.
Such a question does arise, however, in relation to Broad Idea. As Broad Idea is located in the BVI, no permission was needed to serve it with a claim form. The present case is thus one of precisely the kind which Lord Mustill in Mercedes Benz [1996] AC 284, 304G-H, envisaged might in future occur where: (i) there is undoubted personal jurisdiction over the defendant; (ii) no substantive proceedings are brought against the defendant in the local court possessing such jurisdiction; and (iii) an attempt is made to obtain a freezing injunction in support of a claim pursued in a foreign court.

Black Swan and the decision of the Court of Appeal

72.
The power of the BVI court to grant a freezing injunction in this combination of circumstances was considered in Black Swan Investment ISA v Harvest View Ltd (BVIHCV 2009/399) (unreported) 23 March 2010. In that case the claimant applied in the BVI for a freezing injunction against BVI companies said to be controlled by an individual against whom proceedings had been brought in South Africa. Bannister J held that he was not precluded by authority from granting an injunction to protect the claimant's ability to enforce a money judgment if and when obtained in South Africa against assets held by the BVI companies. Bannister J also observed (at para 15) that:

"… 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."

73.
In Yukos CIS Investments Ltd v Yukos Hydrocarbons Investments Ltd (HCVAP 2010/028) (unreported) 26 September 2011, at paras 143-149, the EC Court of Appeal rejected an argument that Black Swan had been wrongly decided and accepted the principle that a freezing injunction may be granted against a party resident in the BVI who controls assets against which a foreign judgment could be enforced - although the court went on to find that the principle did not apply on the facts of that case. During the following decade, according to an article written by a BVI lawyer specialising in asset recovery, many orders of the kind made in Black Swan were made by the BVI courts in many high value cases: see D Wise, "Black Swan versus Broad Idea" (2020) 26 Trusts & Trustees 750 at 753. Furthermore, in VTB Capital plc v Universal Telecom Management [2013] 2 CILR 94, the Cayman

Islands Court of Appeal also held, in a strongly reasoned judgment, that a freezing injunction can be granted against a “non-cause of action defendant” over whom the court has personal jurisdiction where a judgment obtained in foreign proceedings would be enforceable within the territorial jurisdiction of the court against assets held by that defendant.

74.
However, in the present case the EC Court of Appeal decided that its endorsement of this proposition in Yukos was not binding and wrong and that Black Swan should be overruled. Pereira CJ (with whose judgment Webster JA agreed) and Blenman JA (who wrote a concurring judgment) concluded that under section 24(1) of the BVI Act - which is in substantially the same terms as the first part of section 25(8) of the 1873 Act and section 45(1) of the 1925 Act in England and Wales - the BVI court has no “subject matter jurisdiction” to grant a freezing injunction otherwise than in aid of proceedings claiming substantive relief in the BVI. They considered that they were bound to reach that conclusion by The Siskina and subsequent cases.

The court’s jurisdiction

75.
In Fourie v Le Roux, at para 25, Lord Scott pointed out the ambiguity in statements that the court has no “jurisdiction” to deal with a particular matter by quoting these remarks of Pickford LJ in Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536, 563:

“The first and, in my opinion, the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, ie, that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances.”

It is unclear whether, in holding that the BVI court had no “subject matter jurisdiction” to grant a freezing injunction against Broad Idea, the judges of the EC Court of Appeal were using the term “jurisdiction” in its strict sense to mean “power” or to mean that, although the court has power to grant an injunction, it would be contrary to settled practice to do so. In the opinion of the Board, neither conclusion can be supported.

The court’s power to grant a freezing injunction

76.
The notion that the power of the BVI court to grant a freezing injunction is confined to proceedings in which substantive relief is claimed in the BVI is not consistent with the language of section 24(1) of the BVI Act. That provision gives the High Court power to grant an injunction by “an interlocutory order … in all cases in which it appears to the court or judge to be just or convenient that the order should be made …”. It would be hard to cast the power in wider terms than that. The EC Court of Appeal was persuaded by an argument that, in circumstances where section 24(1) makes no reference to the grant of injunctions in aid of foreign proceedings and no statutory provision similar to section 25 of the 1982 Act in the UK had been enacted in the BVI (although this has since changed), section 24(1) does not give the court power to grant such injunctions. This argument is similar to one rejected by the House of Lords in Channel Tunnel (see para 30 above) and must be rejected for the same reason. It puts the matter the wrong way round. The question is whether there is any justification for treating the words “in all cases” as excluding a case where an injunction is sought in aid of foreign proceedings. The absence of legislation conferring a more specific power is not a reason to do so. Nor

can the fact that such legislation has been enacted in the UK and some other common law jurisdictions (well after the BVI Act was enacted in 1969) have any bearing on the meaning of section 24(1) of the BVI Act.

77.
A reason for reading the language of the provision restrictively was put forward by Lord Diplock in The Siskina (in a passage quoted at para 9 above) when he said that the similarly worded section 45(1) of the 1925 Act, by speaking of an "interlocutory" order, "presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant." The reasoning appears to be that an order can only be described as "interlocutory" if it is made in or in anticipation of proceedings in which the claimant is seeking an order which (unlike an "interlocutory" order) will finally decide a substantive dispute between the parties. It is hard to see how the word "interlocutory" can bear this weight. In Smith v Cowell (1880) 6 QBD 75 the Court of Appeal held that the expression "interlocutory order" in section 25(8) of the 1873 Act was not confined to orders made between the commencement of an action and a final judgment but meant any order other than a final judgment in an action. Whilst Smith v Cowell did not decide this further point (as the relevant order appointing a receiver in that case was made after a final judgment had been obtained), there seems no reason to read into the term "interlocutory" any requirement that there must be a final judgment on the merits of a dispute sought or obtained in the action in which the order is made. The term is perfectly apt to refer to an injunction sought in connection with a claim for final, substantive relief which is being pursued in proceedings before another court or tribunal and whether or not the relief claimed in those proceedings is relief which the High Court has jurisdiction to grant.

78.
In any case, even if the term "interlocutory" in section 25(8) of the 1873 Act and its statutory successors were to be given the restrictive interpretation suggested by Lord Diplock, that would not establish a relevant limit on the court's powers. As the House of Lords made clear in Fourie v Le Roux [2007] 1 WLR 320, section 25(8) did not cut down the powers of the Court of Chancery and other courts to grant injunctions, which were transferred to the new High Court by section 16 of the 1873 Act, as they have been to the BVI High Court by sections 6 and 7 of the BVI Act. As discussed earlier, there was and is no limit on the power of courts with equitable jurisdiction to grant injunctions except where restrictions have been imposed by statute. Hence, as Lord Scott concluded from his review of the earlier authorities in Fourie v Le Roux, at para 30:

"… provided the court has in personam jurisdiction over the person against whom an injunction, whether interlocutory or final, is sought, the court has jurisdiction, in the strict sense, to grant it."

79.
If there is a relevant limitation on the freedom of the BVI court to grant a freezing injunction where it appears to the court to be just or convenient to do so, it could therefore only be based on established practice. There is no such limitation on the court's power.

Established practice

80.
As Lord Scott also observed in Fourie v Le Roux, at para 30, the practice of the courts regarding the grant of injunctions has not stood still since The Siskina was decided in 1977. In particular, as noted earlier, in Channel Tunnel [1993] AC 334 the House of Lords held that the court can grant interlocutory relief against a defendant over whom the court has personal jurisdiction where the substantive proceedings are taking place before an arbitral tribunal or foreign court (see paras 27-31

above). Although expressed in terms of the court's power, it was implicit in the decision in Channel Tunnel that there was no settled practice or principle which prevented the grant of such relief and explicit that there was no practice or principle established by The Siskina line of authorities which did so. The reason why in Channel Tunnel the House of Lords concluded that the power to grant an injunction should not be exercised was that, in the particular circumstances of that case, granting the interlocutory injunction sought would in practice be tantamount to granting final relief which, again in the particular circumstances of that case, would be inappropriate - especially because it would encroach on the parties' choice to entrust assessment of the merits of the dispute to arbitrators. These were discretionary considerations.

81.
In her judgment under appeal (at para 38) Pereira CJ sought to distinguish Channel Tunnel on the basis that Lord Browne-Wilkinson referred, in his conclusion quoted at para 28 above, to the power to grant interlocutory relief "based on a cause of action recognised by English law against a defendant duly served …". Pereira CJ took this to mean that interlocutory relief can be granted only where there is a cause of action against a defendant over whom the court has personal jurisdiction, even if the claim against that defendant is being pursued elsewhere, and not against a "non-cause of action defendant" duly served. Translated to the facts of the present case, this would mean that, if Dr Cho entered the territory of the BVI and was duly served with a claim form, a freezing injunction could in principle be granted against him in connection with the proceedings against him in Hong Kong; however, even if Broad Idea, a BVI company, were holding assets as a nominee for Dr Cho, no freezing injunction under the Chabra jurisdiction could be granted against Broad Idea.

82.
There is no principled basis for drawing such a distinction. It is true that in Channel Tunnel no question arose of granting an interlocutory injunction against a third party, which explains why Lord Browne-Wilkinson's conclusion was expressed as it was. However, as Chadwick P said in VTB Capital plc v Universal Telecom Management [2013] 2 CILR 94, para 43, if Lord Browne-Wilkinson had had in mind a "non-cause of action defendant" duly served within the jurisdiction, it is impossible to think that he would have thought it a bar to the grant of an injunction against such a party that the cause of action (being one recognised by English law) against the primary defendant was being pursued in a foreign court. Once it is accepted that an interlocutory injunction can be granted (i) where substantive proceedings are taking place abroad and (ii) against a "non-cause of action defendant", there is no reason why it should not be granted in an appropriate case where both circumstances are combined. Furthermore, the examples given earlier of third party disclosure orders, Bankers Trust orders and website blocking orders show that there is no principle or practice which prevents an injunction from being granted in appropriate circumstances against an entirely innocent party even when no substantive proceedings against anyone are taking place anywhere.

83.
This is a sufficient basis on which to hold that Black Swan was correctly decided and that the EC Court of Appeal in the present case was wrong to conclude that it should be overruled. But at this stage of the law's development it is possible to go further and to recognise that a freezing injunction is not, on a true analysis, ancillary to a cause of action, in the sense of a claim for substantive relief, at all.

The enforcement principle

84.

It is understandable that the House of Lords should have made that assumption in The Siskina at a time when the Mareva injunction was a novelty and no proper rationale for it had yet been worked out. The assumption was compatible with the rationalisations then advanced which sought to justify the grant of Mareva injunctions on the basis either of an interest in the assets frozen or a right to the sum claimed in the action: see Mercedes Benz [1996] AC 284, 300. In Channel Tunnel the question did not arise, as the interlocutory injunction sought in that case was what might be termed an orthodox interlocutory injunction granting - on a temporary and provisional basis - the substantive relief claimed by the applicant, albeit that the claim for final relief was being pursued before another tribunal. It has been clear, at least since Mercedes Benz, that a freezing injunction is different in character. As Lord Mustill observed in the judgment of the Board in Mercedes Benz, at p 299B, "the Mareva injunction does not enforce anything, but merely prepares the ground for a possible execution by different means in the future". Furthermore, the applicant "does not claim any interest in the assets and seeks an inhibition of dealings with them simply in order to keep them available for a possible future execution to satisfy an unconnected claim" (p 300F).

85.
Lord Mustill elaborated on these points later in the judgment when he said, at p 302, that, if an application for a Mareva injunction succeeds:

"… the relief granted bears no resemblance to an orthodox interlocutory injunction, which in a provisional and temporary way does seek to enforce rights, or to the kind of interim procedural measure which aims to make more effective the conduct of the action or matter in which the substantive rights of the plaintiff are ascertained. Nor does the Mareva injunction enforce the plaintiff's rights even when a judgment has ascertained that they exist, for it merely ensures that once the mechanisms of enforcement are set in motion, there is something physically available upon which they can work." (Emphasis added)

In other words, as Lord Nicholls spelt out more fully in his dissenting judgment, the essential purpose of a freezing injunction is to facilitate the enforcement of a judgment or order for the payment of a sum of money by preventing assets against which such a judgment could potentially be enforced from being dealt with in such a way that insufficient assets are available to meet the judgment.

86.
In JSC BTA Bank v Ablyazov (No 10) [2015] UKSC 64; [2015] 1 WLR 4754, para 13, Lord Clarke of Stone-cum-Ebony (with whom the other Justices agreed) referred to this rationale as "the enforcement principle", adopting terminology which had been used in the Court of Appeal in that case by Beatson LJ, who said:

"The first and primary principle is that the purpose of a freezing order is to stop the injuncted defendant dissipating or disposing of property which could be the subject of enforcement if the claimant goes on to win the case it has brought …"

See JSC BTA Bank v Ablyazov (No 10) [2013] EWCA Civ 928; [2014] 1 WLR 1414, para 34. As Lord Clarke observed, the principle has been put in much that way in many of the decided cases: [2015] UKSC 64; [2015] 1 WLR 4754, para 20. He cited some ten examples, in addition to five authorities already cited by Beatson LJ. To those may be added the statement of Lord Bingham in Fourie v Le Roux, para 2, quoted at para 37 above.

87.

The relevance of the enforcement principle in Ablyazov (No 10) was that it assisted in determining what assets were intended to be covered by the standard form of freezing order issued by the Commercial Court in England and Wales: see [2015] UKSC 64; [2014] 1 WLR 4754, para 26. Thus, Lord Clarke (at para 29) quoted with approval the following passage from Hoyle on Freezing and Search Orders, 4th ed (2006), para 4.28:

"The test must be whether the assets will be available on execution of a judgment and if they are they can be the subject of the order, as its purpose is to aid the court's process. It would otherwise be illogical to include them in the order."

88.
The enforcement principle also explains the basis and scope of the jurisdiction to grant a freezing injunction against a third party against whom no claim for substantive relief lies (ie a "non-cause of action defendant"). The ordinary prerequisite for granting such an injunction (before taking account of discretionary factors) is that the third party is in possession or control of an asset against which a judgment could be executed. That test may be satisfied because there is good reason to suppose that the asset is beneficially owned by a defendant against whom the claimant has obtained or has a right to obtain a judgment, as in the Chabra case. But it may also be satisfied in other ways: for example, where the defendant would have a right of indemnity against the third party which could be enforced by a receiver (C Inc plc v L [2001] 2 All ER (Comm) 446); or where a transaction by which the defendant transferred an asset to the third party might be avoided under section 423 of the Insolvency Act 1986 (Lemos v Lemos [2016] EWCA Civ 1181; [2017] 1 P & CR 12); or where enforcement of a judgment against the defendant might lead to its liquidation whereupon the liquidator would be able to pursue a claim against the third party (Revenue and Customs Comrs v Egleton [2006] EWHC 2313 (Ch); [2007] Bus LR 44). In each case the key question is whether the assets are or would be available to satisfy a judgment through some process of enforcement: see also Cardile v LED Builder Pty Ltd (1999) 198 CLR 380; Algosaibi v Saad Investments Co Ltd 2011 (1) CILR 178, para 43; Linsen International Ltd v Humpuss Sea Transport Pte Ltd [2011] EWHC 2339 (Comm); [2012] Bus LR 1649, paras 146-154; PJSC Vseukrainskyi Aksionernyi Bank v Maksimov [2013] EWHC 422 (Comm), para 7(5); Lakatamia Shipping Co Ltd v Su [2014] EWCA Civ 636; [2015] 1 WLR 291, para 32.

89.
Although it is unnecessary to make the enforcement principle dependent on the identification of a legal or equitable right, there is no harm in expressing the interest of the applicant which a freezing injunction seeks to protect in these terms, provided it is understood to be different, and different in character, from the right on which a cause of action for substantive relief is based. The interest protected by a freezing injunction is the (usually prospective) right to enforce through the court's process a judgment or order for the payment of a sum of money. A freezing injunction protects this right to the extent that it is possible to do so without giving the claimant security for its claim or interfering with the respondent's right to use its assets for ordinary business purposes. The purpose of the injunction is to prevent the right of enforcement from being rendered ineffective by the dissipation of assets against which the judgment could otherwise be enforced.

No requirement of a cause of action

90.
Once it is appreciated that the essential purpose of a freezing injunction is to facilitate the enforcement of a judgment or other order to pay a sum of money, it is apparent that there is no reason

in principle to link the grant of such an injunction to the existence of a cause of action. It was not only Lord Nicholls who made this point in Mercedes Benz [1996] AC 284. Lord Mustill also did so in the judgment of the Board in the passages quoted at paras 84-85 above. Further, in rejecting an analogy which Mercedes had sought to draw with a quia timet injunction, Lord Mustill said, at p 303:

“The remedy [of a quia timet injunction] is knitted together with the rights [asserted in the action] and the threatened infringement of them. With a Mareva injunction the right to the injunction and the ultimate right to damages or whatever else is claimed in the action are wholly disconnected.”

91.
The point that, analytically, there is no connection between a freezing injunction and a cause of action for substantive relief is also demonstrated by the law - not yet established when The Siskina was decided - that a freezing injunction may be granted after a judgment has been obtained. Under the doctrine of merger, a cause of action is extinguished once judgment has been given on it, and the claimant’s sole right is a right founded on the judgment: see eg Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2013] UKSC 46; [2014] AC 160, para 17. Therefore, when a freezing injunction is granted post-judgment, there is no extant cause of action for damages or other substantive relief in aid of which the injunction could be granted. In any case, as noted earlier, a freezing injunction may be granted to aid the enforcement of an order to pay a sum of money - such as the costs order made in favour of the successful defendant in Jet West Ltd v Haddican - for which an action claiming substantive relief was not and never could have been brought.

92.
In applying for a freezing injunction, the relevance of a cause of action, where there is one, is evidential: in showing that there is a sufficient basis for anticipating that a judgment will be obtained to justify the exercise of the court’s power to freeze assets against which such a judgment, when obtained, can be enforced. That is the rationale for requiring the applicant to show a good arguable case; but there is no reason why the good arguable case need be that the applicant is entitled to substantive relief from the court which is asked to grant a freezing injunction. What in principle matters is that the applicant has a good arguable case for being granted substantive relief in the form of a judgment that will be enforceable by the court from which a freezing injunction is sought. It would be “a pointless insularity”, in the phrase used by Hoffmann J in Bayer AG v Winter (No 2) [1986] FSR 357, 362 - or as Lord Nicholls said in Mercedes Benz [1996] AC 284, 311D, “a pointlessly negative attitude, lacking a sensible basis” - to limit the remedy to cases where the judgment is being sought in the territorial jurisdiction where the injunction is needed to preserve assets against which the judgment can be enforced.

Domestic and foreign judgments

93.
Such an approach would also undercut regimes which are intended to make the court’s process for enforcing its own judgments available to enforce arbitration awards and foreign judgments. For example, under the Reciprocal Enforcement of Judgments Act 1922 and the Foreign Judgments (Reciprocal Enforcement) Ordinance 1964 in the BVI, a foreign judgment given in a country to which the legislation applies, on being registered in the High Court, has the same force and effect for the purposes of execution as if the judgment had been a judgment originally given in the High Court. Provided there are assets against which a judgment registered under this legislation could be executed through the process of the BVI court and a sufficient prospect that such a judgment will be obtained in the foreign court, there is just as much reason to grant a freezing injunction if it is needed

to prevent execution of the judgment from being frustrated as there is where the initial proceedings are taking place in the High Court. Indeed, declining to assist where the proceedings are pending in the foreign court would not only be unprincipled but contrary to the spirit and arguably also the letter of the legislation providing for reciprocal enforcement.

94.
Hong Kong is not covered by this legislation and a judgment given by a Hong Kong court could therefore only be enforced in the BVI by means of an action founded on the judgment. The effect of a foreign judgment at common law was summarised by Lord Bridge in Owens Bank Ltd v Bracco [1992] 2 AC 443, 484:

“A foreign judgment given by a court of competent jurisdiction over the defendant is treated by the common law as imposing a legal obligation on the judgment debtor which will be enforced in an action on the judgment by an English court in which the defendant will not be permitted to reopen issues of either fact or law which have been decided against him by the foreign court.”

While the procedure of bringing an action on the judgment is more cumbersome than where a judgment is enforceable on registration, there is no reason in principle why this should affect the court’s willingness to lend its assistance where needed by granting a freezing injunction to ensure that its process of enforcement will be effective when it is engaged.

95.
There is no difference in principle between a case where a freezing injunction is sought in anticipation of (i) a future judgment of a BVI court in substantive proceedings brought in the BVI, (ii) a future judgment of a foreign court enforceable by the BVI court on registration in the BVI, and (iii) a future judgment of a BVI court obtained in an action brought to enforce a foreign judgment. In each case the injunction, if granted, is directed towards the enforcement of obligations to satisfy judgments which do not yet exist. In each case the question is whether there is a sufficient likelihood that a judgment enforceable through the process of the BVI court will be obtained, and a sufficient risk that without a freezing injunction execution of the judgment will be thwarted, to justify the grant of relief.

The Veracruz I

96.
Counsel for Dr Cho submitted that it would nevertheless be inconsistent with judicial precedent to grant an injunction in a case of this kind before a foreign judgment has been given. They argued that only then does a legal obligation arise to pay a sum of money which is capable of founding an action in the BVI in which a freezing injunction can be sought. In support of this contention reliance was placed on authorities in which the English courts have held that a freezing injunction cannot be granted before a right to payment of a debt or damages has accrued: see Steamship Mutual Underwriting Association (Bermuda) Ltd v Thakur Shipping Co [1986] 2 Lloyd’s Rep 439 (Note); Veracruz Transportation Inc v VC Shipping Co Inc (The Veracruz I) [1992] 1 Lloyd’s Rep 353; and Zucker v Tyndall Holdings plc [1992] 1 WLR 1127.

97.
These cases might be distinguished on the ground that at the time when a freezing injunction was sought the applicant did not on the facts alleged yet have an accrued right to be paid damages or other sum of money for which an action claiming a money judgment could be brought anywhere in the world. In the present case, by contrast, such a right had arisen before the application for a freezing injunction was made, albeit that it was a right enforceable by an action in Hong Kong but not yet by

an action in the BVI. To draw such a distinction would be artificial, however, because any requirement that a right to be paid money must allegedly have accrued before a freezing injunction can be granted is contrary to principle.

98.
The leading case supporting such a requirement is The Veracruz I in which the price for the purchase of a ship was payable on delivery. There was evidence that the ship was about to be delivered in a defective condition giving rise to a claim for damages, and that the purchase price, when paid, would be the only asset against which an award of damages could potentially be enforced. There was also good reason to believe that, as soon as the price was paid, the seller would immediately move the money beyond reach rendering the buyer's claim worthless. To deal with what he described as a purely practical problem of timing, Hobhouse J granted a freezing injunction framed so as to come into effect at the moment when the price was paid over. In doing so he was following a practice devised by Saville J in A v B [1989] 2 Lloyd's Rep 423. The injunction was set aside by the Court of Appeal, however, on the ground that the order made, despite its obvious justice and convenience, was contrary to binding authority. As Sir John Megaw said at p 361:

"I see no valid reason, in logic or practical convenience in the interest of justice, why jurisdiction should not exist … But we are precluded by authority from so deciding …"

99.
The source of the authority by which the Court of Appeal regarded itself as bound was Lord Diplock's statement in The Siskina (in the passage quoted at para 8 above) that a right to obtain an interlocutory injunction 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." It seems clear that, in referring to a "pre-existing cause of action", Lord Diplock did not mean to suggest that the conduct giving rise to a cause of action must already have occurred, as he specifically contemplated a "threatened" invasion of a right. In the case of a freezing injunction, the relevant conduct always lies in the future, as the injunction seeks to pre-empt future dealings in assets that would frustrate enforcement of a judgment which is itself usually prospective. Once it is recognised that, as Lord Mustill put it, with a freezing injunction "the right to the injunction and the ultimate right to damages or whatever else is claimed in the action are wholly disconnected" (see para 90 above), there is no justification for requiring that a right to sue for damages or another form of money judgment must already have accrued before the injunction can be granted. What matters is whether there is a sufficient likelihood (evidenced by the requirements of an intention to institute proceedings and a good arguable case) that a judgment will be obtained and that it will be rendered ineffective unless the court acts now to grant an injunction. Those requirements were all clearly satisfied in The Veracruz I.

100.
There is no more reason to regard the practice followed in The Veracruz I and other similar authorities as immutable than there was for the courts to adhere to the practice of confining freezing injunctions to persons or assets situated within the court's territorial jurisdiction once it became clear that the relevant practice was not based on any sound legal principle and was unsuited to modern conditions. As mentioned earlier, the English Court of Appeal decided that the time had come to depart from the practices of confining freezing injunctions to persons situated outside England and Wales in 1980 and to assets situated in England and Wales in 1988 (see paras 11 and 20 above). Similarly, the time has long since come to state unequivocally that the practice followed in The

Veracruz I is likewise unsound in principle, unfit for modern commerce and should no longer be adopted.

Summary of current practice

101.
In summary, a court with equitable and/or statutory jurisdiction to grant injunctions where it is just and convenient to do so has power - and it accords with principle and good practice - to grant a freezing injunction against a party (the respondent) over whom the court has personal jurisdiction provided that:

i)
the applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;

ii)
the respondent holds assets (or, as discussed below, is liable to take steps other than in the ordinary course of business which will reduce the value of assets) against which such a judgment could be enforced; and

iii)
there is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied.

102.
Although other factors are potentially relevant to the exercise of the discretion whether to grant a freezing injunction, there are no other relevant restrictions on the availability in principle of the remedy. In particular:

i)
There is no requirement that the judgment should be a judgment of the domestic court - the principle applies equally to a foreign judgment or other award capable of enforcement in the same way as a judgment of the domestic court using the court’s enforcement powers.

ii)
Although it is the usual situation, there is no requirement that the judgment should be a judgment against the respondent.

iii)
There is no requirement that proceedings in which the judgment is sought should yet have been commenced nor that a right to bring such proceedings should yet have arisen: it is enough that the court can be satisfied with a sufficient degree of certainty that a right to bring proceedings will arise and that proceedings will be brought (whether in the domestic court or before another court or tribunal).

Preserving the assets of Broad Idea

103.
It follows that the EC Court of Appeal was wrong to hold that it was not open to the BVI court to grant a freezing injunction against Broad Idea because there were no substantive proceedings against

Broad Idea or against Dr Cho in the BVI. The EC Court of Appeal should have concluded that, in circumstances where there are substantive proceedings against Dr Cho in Hong Kong and the BVI court has undoubted personal jurisdiction over Broad Idea, the BVI court can grant a freezing injunction against Broad Idea if it is needed to protect the ability of CCL to enforce a future judgment against Dr Cho in the BVI.

104.
Broad Idea's sole known asset of value is a shareholding in Town Health International Medical Group Ltd ("Town Health"), a company incorporated in the Cayman Islands and continued into Bermuda as a Bermuda exempted company. The shares of Town Health are listed on the Hong Kong stock exchange. At the time when CCL's application for a freezing injunction against Broad Idea was granted by Adderley J on 30 July 2019, Broad Idea's shareholding represented 18.85% of the total share capital of Town Health and had an estimated value of around US$126m.

105.
In giving his reasons for granting the injunction against Broad Idea, Adderley J first of all found that CCL had a good arguable case against Dr Cho in the Hong Kong proceedings and that those proceedings are capable of resulting in a judgment against Dr Cho for damages equivalent to some US$92m which would be enforceable in the BVI. That finding was not criticised by the EC Court of Appeal and was not contested before the Board. In light of the Board's conclusion that there was no jurisdictional or legal impediment to granting a freezing injunction, the critical questions are whether the judge was entitled to find on the facts that such a judgment would be enforceable against the shares which Broad Idea holds in Town Health and that a freezing injunction was necessary in order to protect CCL's ability to utilise such a process of enforcement.

106.
The judge said that he was satisfied that there was a good arguable case that Broad Idea is a "money-box" of Dr Cho. That is not a legal term of art but was used by Sir Bernard Rix in Lakatamia Shipping Co Ltd v Su [2014] EWCA Civ 636; [2015] 1 WLR 291, para 42, in a passage quoted by the judge, to refer to a company which holds assets to which a defendant is beneficially entitled. It is not entirely clear whether the judge considered there to be a good arguable case that the shares held by Broad Idea in Town Health were beneficially owned by Dr Cho alone or by Dr Cho and Mr Choi in proportion to their shareholdings in Broad Idea (compare paras 36 and 38 of his judgment), though the latter seems more probable.

107.
On appeal, as discussed above, the EC Court of Appeal set aside the injunction on the ground that the BVI court had no jurisdiction to grant it. Having reached that conclusion, Pereira CJ (with whose judgment Webster JA agreed) nevertheless went on "for completeness" to consider whether, if the BVI court did have such jurisdiction, it had been properly exercised on the facts of the case. (Blenman JA thought it unnecessary to address this question.) Pereira CJ concluded that there was no proper evidence to support the judge's finding that there was a good arguable case that the shares in Town Health held by Broad Idea (or any of them) are beneficially owned by Dr Cho.

108.
In the Board's view, the conclusion of the Chief Justice on this point is unimpeachable. In his reasons for granting the injunction, the judge did not refer to any evidence capable of supporting an inference that Broad Idea does not beneficially own the shares in Town Health registered in its name. Nor did CCL identify any such evidence on this appeal. The high point of its case appeared to be the fact that

Mr Choi had referred in affidavits filed on behalf of Broad Idea to “my investment” in Town Health. However, Mr Choi explained that the way in which his investment was made was by acquiring Broad Idea with Dr Cho for the purpose of making investments in Town Health. There is nothing in his evidence which suggests that the corporate structure put in place was not intended to reflect the reality of the chain of legal and beneficial ownership. The fact that - as it was put in CCL’s written case - Broad Idea is purely a holding company and its shareholding in Town Health “provides the source of value for” the shares in Broad Idea is not a reason to regard Town Health as a mere nominee; rather, the reverse. No reasonable basis has been shown for asserting that Dr Cho had any direct beneficial interest in any of the shares acquired by Broad Idea.

109.
The judge also said that, even if the shares in Town Health were indeed beneficially owned by Broad Idea, it was necessary to restrain the disposal of the Town Health shares in order to maintain the value of Dr Cho’s shares in Broad Idea. This alternative ground for his decision was not addressed by the Court of Appeal nor in the oral argument before the Board. In its written case, however, CCL defended this ground relying on Gilfanov v Polyakov (BVIHCMAP 2016/0009) (unreported) 3 February 2017. In that case the defendants to proceedings in the BVI had transferred their shares in a BVI company which had substantial assets to a third party with the aim of frustrating any attempt to execute a judgment against the shares. The EC Court of Appeal upheld the decision to grant a freezing injunction against the company on the grounds that, if the claimants obtained a judgment, they could potentially have the share transfer reversed and enforce the judgment against the shares and that, in these circumstances, the claimants had an interest in preserving the value of the company’s assets in order to maintain the value of its shares.

110.
This reasoning involves an extended application of the enforcement principle. As discussed above, the enforcement principle justifies the grant of a freezing injunction where it is needed to ensure that assets against which a judgment could be enforced remain available to satisfy the judgment. It has been pointed out that this principle can in an expanded form apply to any conduct which would diminish the value of assets against which a judgment could potentially be enforced, even if that conduct does not involve dealing with those assets directly: see FM Capital Partners Ltd v Marino [2018] EWHC 2889 (Comm); [2019] 1 WLR 1760, para 39. The prohibition in the standard form of freezing injunction against “diminishing the value of” the respondent’s assets has been interpreted in this way. Thus, in Lakatamia Shipping Co Ltd v Su [2014] EWCA Civ 636; [2015] 1 WLR 291 the English Court of Appeal held that, although assets of a company wholly owned and controlled by the defendant were not his assets for the purpose of such an injunction, the injunction restrained the defendant from procuring the company to dispose of its assets as this would diminish the value of his shareholding (which was an asset covered by the injunction).

111.
There seems no reason in principle why the expanded form of the enforcement principle should not be applied in an appropriate case to assets held by a “non-cause of action defendant”, as it was in Gilfanov v Polyakov. The practical purpose of granting a freezing injunction against the company in that case was to restrain the third party to whom its shares had been transferred from procuring the disposal of the company’s assets and thereby diminishing the value of its shares (against which a future judgment could potentially be executed). There would not have been a need to grant an injunction against the company if the shares had remained in the possession of the defendants, as in that event the freezing injunction granted against them would have restrained them from procuring

the company to dispose of its assets (thereby diminishing the value of the shares) and no purpose would have been served by granting in addition a freezing injunction against the company itself.

112.
In the present case, at the time when the freezing injunction against Broad Idea was granted, there was no freezing injunction against Dr Cho restraining him from disposing of or dealing in any way he chose with his controlling shareholding in Broad Idea. The freezing injunction initially obtained against him in the BVI had been discharged because he was not subject to the jurisdiction of the BVI court (see above) and no application had yet been made for such a freezing injunction against Dr Cho in Hong Kong, despite that being the obvious place in which to seek one. The fact that Dr Cho had absconded to Australia was no bar to applying for a freezing injunction against him in Hong Kong any more than it had precluded the application made in the BVI. In circumstances where Dr Cho remained free to dispose of or deal in any other way with his shares in Broad Idea, there was no justification for seeking to prevent conduct which would indirectly diminish the value of those shares. There was therefore no justification for granting a freezing injunction against Broad Idea which was designed to maintain the value of Dr Cho's shares in Broad Idea.

113.
Since then, and since the judgment of the EC Court of Appeal allowing Broad Idea's appeal, the position has changed in that on 16 June 2020 the Hong Kong Court of Appeal, reversing a decision of the judge, granted a worldwide freezing injunction against Dr Cho. That injunction restrains Dr Cho from (among other things) disposing of, dealing with or diminishing the value of his shares in Broad Idea. Dr Cho is accordingly restrained by that injunction from using his powers of control over Broad Idea to procure the company to deal with its shares in Town Health in a way which would reduce the value of his shareholding in Broad Idea. For Mr Choi knowingly to assist in such a transaction would also put him in contempt of the Hong Kong court. It is not evident that there is in these circumstances any need or warrant for granting, in addition, an injunction against Broad Idea. Any application for an injunction against Broad Idea, if said to be required to make the worldwide freezing injunction against Dr Cho effective, would in any event need to be made to the BVI court and/or the Hong Kong court on the basis of up-to-date evidence which reflects the current situation. It is not a matter suitable for determination by the Board on this appeal.

Raising The Siskina?

114.
A minority of the Board considers that the Board should not decide on this appeal whether there is power (and it is consistent with equitable principles) for the court to grant a freezing injunction against a defendant in aid of foreign proceedings when no substantive claim is made against that defendant in proceedings before the domestic court. There are three main reasons. The first is a concern that, although accepting CCL's case on this issue does not involve departing from the ratio of The Siskina, for the Board to reject the wider statements of principle made by Lord Diplock in that case would derogate from the value of certainty and consistency in the common law. In this regard, a particular concern is expressed that to take this course may have unforeseen consequences for the laws of jurisdictions which have legislated in response to The Siskina. Second, it is said that the reasoning in The Siskina has not in fact impeded the development of the common law as it affects the grant of interim injunctions and that, where it has been thought desirable to allow freezing injunctions to be granted in aid of foreign proceedings, this has been achieved through legislation, in different ways in different jurisdictions. Third, the view is expressed that, because the Board has ultimately concluded (unanimously) that the decision of the EC Court of Appeal to allow the appeal of Broad Idea

should be upheld on the particular facts of this case, the “power issue” does not actually arise for decision and nothing said about it by the Board can amount to a binding precedent. In these circumstances the minority considers that the Board should allow the common law to develop in a more incremental way and should not “seek to put the clock back to 1977”.

115.
As will already be clear, the majority of the Board cannot agree that rejecting in their entirety Lord Diplock’s wider statements in The Siskina would involve putting the clock back. Rather, the reverse would be true. It would be putting the clock back if the Board were now to lend any credence to the notion that those statements remain good law. Since The Siskina was decided, the proposition that the power to grant an interlocutory injunction, or its exercise, is dependent on the existence of a claim for substantive relief which the court has jurisdiction to grant has been comprehensively undermined. In the case of freezing injunctions, that proposition is, as discussed, inconsistent with the practices of granting such injunctions after a judgment for substantive relief has already been given and against third parties against whom no claim for substantive relief exists (or has existed). It is also inconsistent with the practices of granting other types of injunction, such as third party disclosure orders, Bankers Trust orders and website blocking injunctions. Nor is it even a bar to granting an orthodox conventional interlocutory injunction that the substantive claim is being pursued in arbitration or a foreign court: see Channel Tunnel. Furthermore, in so far as Lord Diplock’s dicta were founded on the proposition derived from North London Railway that an injunction may only be granted to protect an independently identifiable legal or equitable right, that proposition has been authoritatively rejected in later cases (see paras 52-58 above). In deciding the power issue, it has been necessary to consider not only the evolving practice in relation to freezing injunctions but also (as Lord Diplock did) the juridical basis for the grant of injunctions generally. In doing so, however, this judgment seeks not to break new ground but to integrate into a coherent statement the principles which underpin the exercise of the relevant power.

116.
At the same time, the majority of the Board considers that the reasoning in The Siskina has impeded the development of the common law. The fact that it has been felt necessary in various jurisdictions - including not only the United Kingdom but also Guernsey, Hong Kong, the Cayman Islands and now the BVI - to enact legislation in order to authorise the grant of interim relief in connection with foreign proceedings is itself evidence that it has done so. The fact that The Veracruz I and other cases in that line of authority have been thought to preclude granting a freezing injunction unless and until a cause of action for substantive relief has accrued is another illustration of how the reasoning in The Siskina has continued to this day to be a source of uncertainty and inconsistency in the common law. So too is the fact that in the present case the EC Court of Appeal felt compelled on the authority of The Siskina to conclude that, “as undesirable as it may be perceived in modern day international commerce” (see para 50 of the judgment of Pereira CJ), there is no power at common law to grant a freezing injunction against a defendant within the court’s territorial jurisdiction in aid of foreign proceedings.

117.
The correctness of that conclusion, and of the statements in The Siskina on which it was based, is squarely in issue on this appeal. It is because of the importance of this issue and of the question about service that the appeal has been heard by a constitution with seven members. The power issue has been fully argued and the reasoning in The Siskina defended in terms of both principle and precedent by counsel for Dr Cho and Broad Idea in extensive and well-formulated written and oral submissions.

118.
Those submissions have included a survey of the law in other jurisdictions and the argument that, for the Board to invalidate the assumption on which some jurisdictions, including now the BVI, have legislated would risk causing confusion and undermining those statutory schemes. The majority of the Board is unpersuaded by this argument. There is no inconsistency between legislation such as section 25 of the 1982 Act in England and Wales (referred to at para 17 above) and our conclusion about the extent of the court's power under section 37 of the 1981 Act and its predecessors. The existence of an overlap between statutory powers is not an uncommon occurrence and there is no reason why it should generate uncertainty. In the Cayman Islands, as mentioned at para 73 above, the Court of Appeal in VTB Capital plc v Universal Telecom Management anticipated the Board's decision in the present case. The Cayman Islands' legislature nevertheless still chose to add a new section 11A to the Grand Court Law in 2015 which created an express statutory power to grant interim relief in relation to proceedings commenced in a foreign court which are capable of giving rise to a judgment which may be enforced in the Cayman Islands. The new section 24A of the BVI Act, which is in similar terms to section 25 of the 1982 Act, can also operate in the future alongside and in harmony with section 24(1) of the BVI Act.

119.
Nor does the fact that the Board has upheld the conclusion of the EC Court of Appeal on the facts preclude or make it inappropriate to decide the power issue - any more than was the case, for example, in Channel Tunnel where a similar situation obtained. Another analogy is Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465, where the conclusion that, on the facts, the defendant had successfully disclaimed responsibility for its misrepresentation did not prevent the House of Lords from deciding the important issue of principle that there can be liability in tort for a negligent misrepresentation in the absence of a contract between the parties: see eg WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd [1967] 2 All ER 850, 857.

120.
The majority of the Board considers that it is both necessary and important on this appeal to confront and decide the power issue. It is necessary to dispel the residual uncertainty emanating from The Siskina and to make it clear that the constraints on the power, and the exercise of the power, to grant freezing and other interim injunctions which were articulated in that case are not merely undesirable in modern day international commerce but legally unsound. The shades of The Siskina have haunted this area of the law for far too long and they should now finally be laid to rest.

Conclusion

121.
For the reasons stated in this judgment, it is the decision of the Board that, where the court has personal jurisdiction over a party, the court has power - and there is no principle or practice which prevents the exercise of the power - to grant a freezing injunction (or other interim injunction) against that party to assist enforcement through the court's process of a prospective (or existing) foreign judgment. The EC Court of Appeal was wrong to hold otherwise and to overrule Black Swan. The Court of Appeal was nonetheless justified in setting aside the freezing injunction granted against Broad Idea on the facts of this case and was right to hold that the BVI court had no personal jurisdiction over Dr Cho. Accordingly, the Board will humbly advise Her Majesty that both appeals should be dismissed.

SIR GEOFFREY VOS: (with whom Lord Reed and Lord Hodge agree)

Introduction

122.
There are two main legal questions to be considered on this appeal. The first question is whether a court has the power at common law to grant a freezing or Mareva injunction against a defendant when no substantive claim is made against that defendant in proceedings before the domestic court (the "power issue"). Such relief is said to be available in aid of existing or intended foreign proceedings or arbitration. The second question is whether, if such a power exists, the gateway allowing a claim form to be served out of the jurisdiction if "a claim is made … for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction" (Part 7.3(2)(b) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("EC CPR")) permits service out where the only claim made is for a freezing injunction (the "service out issue"). In two separate appeals, the Eastern Caribbean Court of Appeal (the "ECCA") decided the power issue in favour of the first respondent, Broad Idea International Ltd ("Broad Idea"), a British Virgin Islands ("BVI") company, and the service out issue in favour of the second respondent, Dr Cho Kwai Chee Roy ("Dr Cho"), a resident of Hong Kong.

123.
The respondents contended before the ECCA and now before the Board that both these questions have long been settled by the House of Lords' decision in Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA [1979] AC 210 ("The Siskina") and by the Privy Council's decision in Mercedes Benz AG v Leiduck [1996] AC 284 ("Mercedes"). Convoy Collateral Ltd ("CCL"), a Hong Kong company, argues that the Board should now depart from its decision in Mercedes and from the House of Lords' decision in The Siskina, and direct that the UK Supreme Court should follow that departure (see Willers v Joyce (No 2) [2018] AC 843, para 21 per Lord Neuberger).

124.
As to the power issue, CCL submitted that the rationale for the grant of freezing injunctions is that they are ancillary to a prospective right of enforcement to which the claimant may become entitled in the jurisdiction in question (see Lord Nicholls' dissenting judgment in Mercedes at pp 310-311). Lord Diplock's reasoning in The Siskina ignored the crucial distinction between an ordinary interlocutory injunction of the kind discussed in American Cyanamid Co v Ethicon Ltd [1975] AC 396 and the then nascent Mareva injunction. He wrongly applied reasoning from the North London Railway Co v Great Northern Railway Co (1883) 11 QBD 30 ("North London Railway") to the question of whether or not the court had power to grant a freezing injunction in aid of foreign process. Once one understood the juridical basis for the freezing injunction, it became clear that there was no need for the court to identify an underlying cause of action justiciable within the jurisdiction in order to exercise the power to grant a freezing order under the widely drafted statutory power (as to which see paras A-C of the Appendix).

125.
Broad Idea's argument in answer to CCL's far-reaching submissions was stark and straightforward. It submitted that CCL had advanced no substantive claim against it anywhere and, in those circumstances, there was no basis in fact for a freezing injunction to be made against it, the shares it holds in its subsidiary or the assets of its subsidiary. CCL had singularly failed to establish that Broad Idea was Dr Cho's creature or money box, or that Broad Idea's property was in fact beneficially owned by Dr Cho. In the absence of such evidence, the jurisdiction established in TSB Private International Bank SA v Chabra [1992] 1 WLR 231 ("Chabra") could not be engaged in this case. An injunction of the kind granted in the BVI by Bannister J in Black Swan Investment ISA v Harvest View Ltd (BVIHCV

2009/399) (unreported) 23 March 2010, (“Black Swan”) was unprincipled and in conflict with the reasoning in The Siskina and of the majority in Mercedes. In Black Swan, a freezing injunction had been granted against BVI companies that were said to be owned and controlled by the defendant to South African insolvency proceedings, in aid of those proceedings.

126.
As to the service out issue, CCL submitted that it was decided on a false basis in The Siskina. The court had power to grant a stand-alone freezing order in aid of foreign proceedings, and EC CPR Part 7.3(2)(b) was obviously broad enough to allow an application to be served out of the jurisdiction on a foreign defendant against whom enforcement proceedings might legitimately be brought in due course within the jurisdiction. Dr Cho submitted, in answer, that the EC CPR did not envisage service out of anything but a claim form making a substantive claim. Moreover, the relevant parts of the EC CPR had been drafted in 2000, just after the Board had decided definitively in Mercedes that substantially identical wording in the Hong Kong Rules of the Supreme Court did not permit a writ claiming only Mareva relief to be served outside the jurisdiction. The majority in Mercedes had assumed in the appellant’s favour that The Siskina had been wrong to decide that a freezing injunction could not be granted in support of proceedings in a foreign court (Lord Mustill at p 297G). In the circumstances, there was no basis for the Board to depart from its decision in Mercedes to allow service out in this case on Dr Cho. In any event, CCL’s rights against Dr Cho were adequately protected by the worldwide freezing order granted against him in ongoing Hong Kong proceedings.

127.
I will deal first with some essential background, before turning to consider the most significant authorities and the issues already adumbrated.

Essential background

128.
Dr Cho is a resident of Hong Kong and a director of Broad Idea. He owns 50.1% of Broad Idea’s shares. The other 49.9% of Broad Idea’s shares are owned by Mr Francis Choi, also a resident of Hong Kong (“Mr Choi”). Broad Idea’s only asset is its 18.85% shareholding in Town Health International Medical Group Ltd (“Town Health”), a company originally incorporated in the Cayman Islands, continued into Bermuda, and listed on the Hong Kong Stock Exchange. The estimated value of Dr Cho’s shareholding in Broad Idea is some HK$490m or US$63m.

129.
In May 2017, an activist investor, Mr David Webb, published a report concerning the so-called “Enigma Network” of companies. The report alleged extensive cross-shareholdings in a network of 50 Hong Kong listed companies. Town Health and CCL’s parent company, Convoy Global Holdings Ltd (“Convoy”), were named as members of that network. Dr Cho was a director of both Convoy and Town Health. He was removed as a director of Convoy on 17 August 2018 and resigned as a director of Town Health on 29 June 2018. The Independent Commission Against Corruption in Hong Kong (“ICAC”) laid criminal charges against Dr Cho in respect of his role in Convoy but he was acquitted on all charges. ICAC filed an appeal against the acquittal in December 2020.

130.
On 2 February 2018, CCL applied ex parte to the Commercial Court of the Eastern Caribbean Supreme Court in the BVI for freezing injunctions against Broad Idea and Dr Cho in support of anticipated proceedings against Dr Cho in Hong Kong and for permission to serve Dr Cho outside the BVI.

131.
On 9 February 2018, Chivers J ordered that:

i)
Broad Idea be restrained from (a) disposing of, dealing with or diminishing the value of its shareholding in Town Health up to a value of some US$75.5m, and (b) registering, or causing to be registered, any change in the ownership of Dr Cho's shares in Broad Idea;

ii)
Dr Cho be restrained from (a) disposing of, dealing with or diminishing the value of either his assets within the BVI up to some US$75.5m, or his shares in Broad Idea, whether inside or outside the BVI, and (b) effecting any changes, variations or amendments to any agreement or trust in relation to which his shares in Broad Idea were held; and

iii)
CCL was to be permitted to serve its application dated 6 February 2018 for a "Freezing Order" pursuant to Part 17 of the EC CPR (the "first Application") on Dr Cho outside the jurisdiction in Hong Kong.

132.
There are two Hong Kong actions alleged to arise from two stages of Convoy's investigations into Dr Cho's alleged wrongdoing. The first ("claim HCA 2922/2017") was issued by Convoy, CCL and Convoy Securities Ltd on 18 December 2017 against Dr Cho, and some 27 (now 41) other defendants, claiming damages, equitable compensation, declaratory relief and rescission of various share transactions. Mr Choi was later joined. The central allegation is that Dr Cho was a de facto or shadow director of Convoy and acquired ownership and control over it; he thereby made managerial and/or executive decisions for the Convoy Group, including CCL. Broad Idea contends that the allegations in HCA 2922/2017 are irrelevant to this appeal because they do not support the relief sought against either Dr Cho or Broad Idea.

133.
The second Hong Kong action, claim HCA 399/2018, was issued on 14 February 2018 (after Chivers J's order) by CCL against Dr Cho and ten other defendants claiming damages, equitable compensation, and an account of profits in the amount of some HK$715m, and declaratory relief. It is alleged against Dr Cho that, as de facto or shadow director of CCL, he acted in breach of fiduciary duty and duties of care and prudence or had dishonestly assisted the directors in those breaches.

134.
Some ten months after Chivers J's order, on 4 December 2018, Dr Cho issued an application to set it aside. Adderley J set aside the entirety of Chivers J's order against Dr Cho on 2 May 2019 (the "first order"). Adderley J held that (a) the court had no inherent jurisdiction to permit service out, beyond the powers conferred by the EC CPR, (b) no EC CPR gateway allowed service out of an application for a freestanding freezing order in support of foreign proceedings, and (c) the court was bound to follow the majority in Mercedes as to the construction of EC CPR rule 7.3(2)(b) (the "injunction gateway"). It is to be noted that, at that stage, Broad Idea remained bound by undertakings to the court in substantially the form of Chivers J's order. On 2 May 2019, CCL filed its Notice of Appeal against Adderley J's first order.

135.

On 27 March 2019 CCL issued an application for a further freezing injunction against Broad Idea, extending the relief already granted by Chivers J to cover additional share transactions and all the shares in Broad Idea (the "second application"). Chivers J's order had been continued against Broad Idea by undertakings. On 17 March 2019, Broad Idea said that it would not extend its undertakings after 2 April 2019 and that it would oppose any injunction application. It was seemingly this that prompted CCL to issue the second application against Broad Idea on 27 March 2019. Broad Idea continued its undertakings over the substantive hearing of the second application at the hearing of Dr Cho's application before Adderley J on 2 and 3 April 2019.

136.
Adderley J heard the second application on 26 June 2019, nearly two months after he had set aside Chivers J's order against Mr Cho. He granted the extended freezing order sought by CCL against Broad Idea on 30 July 2019 and gave written reasons on 27 August 2019. His order (the "second order") prevented Broad Idea from dealing with any of its assets anywhere up to US$75.5m, changing its share register, and registering changes in its legal or beneficial share ownership. On 24 September 2019, Broad Idea filed its Notice of Appeal against Adderley J's second order. Chivers J's order against Broad Idea (continued by undertakings) lapsed after the hearing before Adderley J imposing a new wider injunction against Broad Idea.

137.
On 30 March 2020, the ECCA (Hon Mr Davidson Kelvin Baptiste JA, Hon Madame Gertel Thom JA, and Hon Mr Paul Webster JA (Ag)) dismissed CCL's appeal against Adderley J's first order (having heard the appeal on 18 October 2019), substantially upholding Adderley J's reasoning (the "first appeal").

138.
On 29 May 2020, the ECCA (Hon Dame Janice M Pereira, DBE CJ, Hon Madame Louise Esther Blenman JA and Hon Mr Paul Webster JA (Ag)) allowed Broad Idea's appeal against Adderley J's second order (having heard the appeal on 9 and 10 December 2019), holding that:

i)
There were no allegations against Broad Idea in any claim made by CCL either in the BVI or Hong Kong or elsewhere.

ii)
As CCL had not asserted any cause of action against Broad Idea, the judge had no power to grant a freezing order against it.

iii)
The Siskina, Mercedes and other authorities affirmed the need for substantive proceedings in the same jurisdiction before a freezing order could properly be granted.

iv)
The decision in Black Swan, in which it was held that a freezing order could be granted in aid of foreign proceedings, was wrongly decided and was overturned. Bannister J had been wrong in Black Swan to rely on Lord Nicholls's dissenting judgment in Mercedes. He had not been entitled to assume such a jurisdiction in the absence of legislation to that effect.

v)

It had not been open to Adderley J to regard Broad Idea as a valid non cause of action defendant ("NCAD") under the rule in Chabra as there was no cause of action raised by CCL against Dr Cho (the cause of action defendant or "CAD") in the BVI.

vi)
There was not, on the facts, a sufficient basis for the conclusion that Broad Idea was merely holding assets to which Dr Cho was beneficially entitled. Nor were Broad Idea's assets amenable to any process of execution to satisfy any judgment that might be obtained against Dr Cho in Hong Kong. There was, therefore, no basis for Adderley J's finding of a risk of dissipation.

139.
On 16 June 2020, after both decisions of the ECCA, the Hong Kong Court of Appeal allowed an appeal from Harris J's refusal on 11 March 2020 to grant a freezing injunction against Dr Cho, and imposed an order against him restraining him from disposing of, dealing with or diminishing the value of any of his assets, including the value of his shares in Broad Idea in the BVI, up to some HK$769.5m.

140.
On 30 September 2020, the Privy Council reinstated the freezing injunction against Broad Idea on an interim basis on the same terms as those granted by Adderley J on 30 July 2019, and stayed the ECCA's order on CCL's appeal against the second order.

141.
On 6 October 2020, the ECCA granted Broad Idea final leave to appeal the ECCA's second order to the Board. On 14 October 2020, CCL was granted special leave to appeal the ECCA's first order to the Board, and the Board directed that the two appeals should be consolidated. On 19 October 2020, the Board granted interim relief in the form of Chivers J's order against Dr Cho.

The essential authorities

142.
The way the law has developed in relation to the power to grant freezing injunctions and other relief in support of foreign proceedings or arbitrations can be more easily understood if the essential authorities are considered in chronological order.

North London Railway (1883)

143.
North London Railway was decided relatively soon after the court's power to grant injunctions was codified in section 25(8) of the Supreme Court of Judicature Act 1873 ("section 25(8)"). It provided that "an injunction may be granted … by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made" (see para iii of the Appendix for the most recent version of this enactment).

144.
The Court of Appeal held that an injunction would not be granted to restrain a party from proceeding with an arbitration where it was alleged that its subject matter went beyond the arbitration agreement, even where the arbitration proceeding would be futile and vexatious.

145.
Lawrence Collins LJ analysed the ratio of North London Railway in Masri v Consolidated Contractors International (UK) Ltd (No 2) [2009] QB 450 ("Masri") at paras 141-148. I do not feel that I can

improve on that analysis. North London Railway held that section 25(8) had not given the court any jurisdiction to grant an injunction in a case where prior to the 1873 Act there was no legal right or liability. The ratio of the decision was that the words “just or convenient” in section 25(8) did not increase the power of the court or the rights of parties so as to give either a right which did not exist in law or equity before the 1873 Act (see pp 36 and 38 per Brett LJ, and p 39 per Cotton LJ). As Cotton LJ said at p 40:

“The sole intention of the section is this: that where there is a legal right which was, independently of the [1873] Act, capable of being enforced either at law or in equity, then, whatever may have been the previous practice, the High Court may interfere by injunction in protection of that right.”

Since there was no such right in that case, there could be no injunction. I interpose, however, that North London Railway said nothing about what legal or equitable rights might in the future exist.

146.
As Lawrence Collins LJ pointed out at para 144, however, Brett and Cotton LJJ, did not agree on the extent to which the court would be bound by pre-1873 practice. Brett LJ said, at p 36, that it was not necessary to decide whether section 25(8) had given power to issue an injunction in cases where no court could have issued an injunction before the 1873 Act, but his inclination was in the negative. Cotton LJ said, however, at p 39 that section 25(8) gave the court “power, if it should think it just or convenient, to superadd to what would have been previously the remedy, a remedy by way of injunction, altering therefore not in any way the rights of parties so as to give a right to those who had no legal right before, but enabling the court to modify the principle on which it had previously proceeded in granting injunctions, so that where there is a legal right the court may, without being hampered by its old rules, grant an injunction where it is just or convenient to do so for the purpose of protecting or asserting the legal rights of the parties”. In Cotton LJ’s view, “all that was done by [section 25(8)] was to give … the High Court power to give a remedy which formerly would not have been given in that particular case, but still only a remedy in defence of or to enforce rights which according to law were previously existing and capable of being enforced”. That was why he formulated the general principle as he did including the words “whatever may have been the previous practice”. It was a misunderstanding of North London Railway to think that it was authority for the proposition that section 25(8) gave no power to the court to grant an injunction in a case where no court could have granted one before the 1873 Act. Brett LJ left that question open, and Cotton LJ accepted that section 25(8) expanded the scope of the remedies which might be available.

147.
Lord Collins of Mapesbury approved his own analysis in Masri in Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd [2011] UKPC 17; [2012] 1 WLR 1721, para 56 (“Tasarruf”). He said that Masri had held that certain decisions were based on a misunderstanding of North London Railway, and that “the court was not bound by pre-1873 practice to abstain from incremental development. The jurisdiction could be exercised to apply old principles to new situations”. The “decisions” that he referred to were those concerning the power to appoint a receiver including Holmes v Millage [1893] 1 QB 551, 557. Lord Collins said that Masri confirmed or established principles that “(1) the demands of justice are the overriding consideration in considering the scope of the jurisdiction under section 37(1) [of the Senior Courts Act 1981 - ‘section 37(1)’]” and “(2) the court has power to grant injunctions and appoint receivers in circumstances where no injunction would have been granted or receiver appointed before 1873”.

The Siskina (1979)

148.
In The Siskina, overseas cargo owners were bringing proceedings in Cyprus against a one-ship Panamanian shipowner. The ship in question sank in Greek waters and the defendant's only assets were the insurance proceeds in London. The cargo owners sought a Mareva injunction from the High Court. The House of Lords refused the injunction on the basis that the High Court had no power to grant an interlocutory injunction except to protect a right which it had jurisdiction to enforce by final judgment. The claim for a Mareva injunction against a foreign defendant in support of foreign proceedings did not come within RSC Order 11, rule 1(1)(i) and could not be served out of the jurisdiction. The question of the true ratio of The Siskina was in dispute between the parties.

149.
It is as well first to set out the classic passage from the judgment of Lord Diplock in The Siskina at p 256:

"The words used in sub-rule (i) [of RSC Order 11, rule 1(1)] are terms of legal art. The sub-rule speaks of 'the action' in which a particular kind of relief, 'an injunction' is sought. This pre-supposes the existence of a cause of action on which to found 'the action'. 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 LJ in North London Railway Co v Great Northern Railway Co (1883) 11 QBD 30, 39-40, which has been consistently followed ever since."

150.
Lord Hailsham at pp 260-261, made three important points. First, he suggested that, until the three cases in which Mareva injunctions had been granted, he would have regarded the case in favour of the injunction as wholly unarguable. (Those cases were Nippon Yusen Kaisha v Karageorgis [1975] 1 WLR 1093, 1095, Mareva Cia Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd's Rep 509 (the "Mareva case"), and Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia intervening) (The Pertamina) [1978] QB 644 (the "Pertamina case")). He relied in this regard on dicta of Lord Hatherley LC in Mills v Northern Railway of Buenos Ayres Co (1870) LR 5 Ch App 621, 628, James LJ in Robinson v Pickering (1881) 16 Ch D 660, 661, Cotton LJ in Lister & Co v Stubbs (1890) 45 Ch D 1, 14, and Sir J Hannen P in Newton v Newton (1885) 11 PD 11, 13. Secondly, he said that he was "at one time disposed to think that, if the right to an injunction was still as flexible a remedy as from these cases it now appears to be, there was little reason why it should not be extended further to protect the position of the present respondents" who had all the merits. Thirdly, at p 262, he thought that the Rules Committee was a "far more suitable vehicle for discharging the function [of sanctioning a change in practice, indeed an extension of jurisdiction, in matters of this kind] than a panel of three judges, however eminent".

Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd [1981] AC 909 (“Bremer Vulkan”)

151.
Four years after The Siskina, in Bremer Vulkan, the claimants sought an injunction to restrain the defendant from proceeding with an arbitration. Lord Diplock’s majority judgment forcefully reiterated what he saw as the ratio of The Siskina. The House was, however, unanimous in deciding that the court had power under what had become section 45 of the Supreme Court of Judicature (Consolidation) Act 1925 to grant an injunction to restrain an arbitration in order to protect the legal right of an innocent party who had elected to treat the arbitration agreement as terminated after a repudiatory breach.

152.
Lord Diplock said at pp 979A-980C that The Siskina had confirmed “as a matter of ratio decidendi the well-established law that the jurisdiction of the High Court to grant injunctions, whether interlocutory or final, was confined to injunctions granted for the enforcement or protection of some legal or equitable right”, approving Cotton LJ in North London Railway. Lord Fraser’s dissenting judgment at p 992 said that whether the Court of Appeal’s view of the facts in North London Railway was right or wrong, he doubted whether “it would be accepted in similar circumstances today” (with which Lord Scarman agreed at p 995C), but “the principle is clear and is still applicable to the power of the court under the Judicature Act 1925”.

British Airways Board v Laker Airways Ltd [1985] AC 58 (“Laker”)

153.
In Laker, the House of Lords refused British Airways an anti-suit injunction to prevent Laker (in liquidation) from pursuing a claim under the US Sherman Act in the US District Court, on the basis that there was no cause of action justiciable in an English court and only a single (US) forum competent to determine the merits of Laker’s claim. British Airways had not shown that they had any English law legal or equitable right not to be sued in the US proceedings. It was not unconscionable for Laker to do so.

154.
Lord Diplock’s speech (with whom Lords Fraser, Scarman, Roskill and Brightman agreed) demonstrated some movement from The Siskina. He accepted at pp 80H-81G that he had restated the rule in North London Railway in The Siskina in a way that was in one respect too narrow. It had omitted to mention the case where a claimant sought an anti-suit injunction against a person amenable to the jurisdiction of the English Court where the claimant had a right not to be sued in that foreign court, or where the defendant sought to assert a defence (such as estoppel, election, waiver, standing by, laches, or blowing hot and cold) to which anticipatory effect should be given. He thought that all of these could attract the generic description of conduct that is unconscionable in the eyes of English law.

155.
Lord Diplock, therefore, agreed (as he had in Castanho v Brown & Root (UK) Ltd [1981] AC 557 (“Castanho”)) with “the qualification to the statement of principle in the stark terms in which [he had] expressed it in [The Siskina]”, that was added by Lord Scarman in Castanho at p 573, when he said “[b]ut the width and flexibility of equity are not to be undermined by categorisation. Caution in the exercise of the jurisdiction is certainly needed: but the way in which the judges have expressed themselves from 1821 onwards amply supports the view for which the defendants contend that the

injunction can be granted against a party properly before the court, where it is appropriate to avoid injustice".

South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV [1987] AC 24 ("South Carolina")

156.
In South Carolina, the House of Lords (Lord Brandon with whom Lords Bridge and Brightman agreed and Lords Mackay and Goff broadly agreed) held that the power to grant injunctions under section 37(1) was limited (subject to two exceptions), following The Siskina, Castanho and Laker, to situations (i) where a party had invaded, or threatened to invade, another's legal or equitable right for the enforcement of which the party was amenable to the jurisdiction of the court, and (ii) where one party to an action had behaved, or threatened to behave, in an unconscionable manner. Lord Brandon said at p 40A-B that, although the terms of section 37(1) and its predecessors were very wide, "the power conferred by them has been circumscribed by judicial authority dating back many years". The two exceptions were anti-suit injunctions and Mareva injunctions. The Mareva exception had, by 1987, been "expressly recognised by section 37(3) of the Supreme Court Act 1981 ['section 37(3)']" (see para v of the Appendix for the terms of section 37(3), and see para 198 below).

Veracruz Transportation Inc v VC Shipping Co Inc (The Veracruz I) [1992] 1 Lloyd's Rep 353 ("Veracruz")

157.
In Veracruz, the Court of Appeal reluctantly discharged a freezing order in aid of a cause of action that had not yet arisen (for an anticipatory breach of a term of a ship sale agreement that on delivery the vessel would be in the same condition as it was when inspected). Beldam LJ delivered the main judgment following The Siskina, whilst both Nourse LJ (at p 360) and Sir John Megaw (at p 361) concurred but expressed their disappointment with the result required by The Siskina.

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334 ("Channel Tunnel")

158.
In Channel Tunnel, the claimant engaged Balfour Beatty to build the tunnel. Clause 67 of the contract provided for the reference of disputes to a panel of experts and for final settlement by arbitration in Brussels. The claimant issued a writ and sought an interim injunction to restrain Balfour Beatty from suspending work. Balfour Beatty sought to stay the claimant's action in favour of arbitration under section 1 of the Arbitration Act 1975.

159.
The House of Lords upheld the stay of the action. It held that a claim to an interlocutory injunction under section 37(1) was incidental to and dependent on the enforcement of a substantive right and could not exist in isolation. Although the substantive right usually took the form of a cause of action, it was not a necessary condition of the grant of such an injunction that it should be ancillary to a claim for relief to be granted by an English court. In doing so, the House distinguished between the English court's power to grant relief and whether it will actually do so (p 342H). There was no reason in principle why an order for a mandatory stay of an action could not be combined with an injunction to secure interim relief. But whilst there was power under section 37(1) to grant the injunction sought by the claimant, it was not appropriate to grant it, since it would largely pre-empt the arbitrators' ultimate decision under clause 67.

160.
Lord Browne-Wilkinson (with whom Lords Keith and Goff agreed) analysed The Siskina at pp 341D-343E. Balfour Beatty had suggested that Lord Diplock's speech (at pp 254 and 256) imposed a third requirement before an interim injunction could be granted **in addition** to personal jurisdiction over the defendants and a cause of action under English law, namely that the interlocutory relief sought had to be ancillary to a claim for substantive relief to be granted by the English court. It was on the basis of that third requirement that Balfour Beatty argued that, since the action had to be stayed, the court had no power to grant the interim injunction. Lord Browne-Wilkinson disagreed, saying that he could "see nothing in the language employed by Lord Diplock (or in later cases in this House commenting on The Siskina) which suggest that a court has to be satisfied, at the time it grants interlocutory relief, that the final order, if any, will be made by an English court". He commented that "in many cases it will be impossible, at the time interlocutory relief is sought, to say whether or not the substantive proceedings and the grant of the final relief will or will not take place before the English court". He referred to Lord Mustill's speech as demonstrating that "in the context of arbitration proceedings whether it is the court or the arbitrators which make such final determination will depend upon whether the defendant applies for a stay", and said that the same was true of ordinary litigation based on a contract having an exclusive jurisdiction clause.

161.
Lord Browne-Wilkinson concluded by commenting that he had assumed that The Siskina correctly stated the law, even though the tests laid down had "already received one substantial modification" in Castanho and Laker. He said that he shared the doubts expressed by Lords Goff and Mackay in South Carolina, reserving the question of "whether the law as laid down by the Siskina (as subsequently modified) was correct in restricting the power to grant injunctions to certain exclusive categories" for consideration when it arises.

162.
Lord Mustill (with whom all agreed) concluded at pp 362D-363G that, although the commencement of the action was a breach of the arbitration agreement, so that in that sense the respondents were not "properly" before the court, that did not bring into play the limitations on the powers of the court established by The Siskina line of cases. He concluded that "the same result must have followed if the [claimant] had done what [it] promised to do, and submitted [its] disputes to the panel and the arbitrators, rather than to the court. The power exists either in both cases or in neither and the [claimant's] breach of the arbitration agreement in bringing an action destined to be stayed [could not] have conferred on the court a power to grant an injunction which it would not otherwise possess. The existence of a pending suit [was] thus an irrelevance".

Mercedes (1996)

163.
In Mercedes, the German claimant sued a German defendant and his Monegasque company in Monaco for misappropriation in respect of a dishonoured promissory note and on the first defendant's aval. The first defendant also owned a Hong Kong company, and Mercedes applied for and was originally granted a freezing injunction against him in Hong Kong, and leave to serve substantive proceedings out of the jurisdiction under various gateways not including the injunction gateway. Service out and the injunction were discharged by the High Court because none of the claims in the writ fell within a gateway. The Court of Appeal held that, even if the writ had claimed Mareva relief, service out would not have been permitted under the injunction gateway, because such an injunction had to be part of a claim for substantive relief which could properly be tried in the courts of Hong

Kong, and the enforcement gateway could not be relied on before judgment in Monaco. The majority of the Privy Council dismissed the appeal.

164.
Lord Mustill, delivering the majority's decision, said at pp 297-298 that it was important to distinguish between territorial jurisdiction and the power to grant an injunction. The first question arose when a foreigner was sued for a Mareva injunction in a jurisdiction in which he had assets, assuming that relief could properly be given notwithstanding The Siskina. The question was whether the statutory enlargement of territorial jurisdiction created by Order 11, rule 1(1) "entitle[d] the court to permit the service of a writ … claiming such relief on the foreigner out of the jurisdiction, thus compelling him to choose between suffering a judgment in default or appearing before a court which has no other jurisdiction over him to argue that his assets should not be detained". The second question assumed that the foreign defendant could be served either within the jurisdiction or by service out, and that the matters in dispute had no connection with the English court and could not be brought before it. The second question was whether the court had "power to restrain the free disposition of the defendant's assets in England and Wales, to await the conclusion of proceedings brought against that person in a foreign jurisdiction".

165.
It is to be noted that these are precisely the two main questions that arise in these appeals. Importantly, the majority in Mercedes considered that the territorial question ought to be considered first (p 298C-D), because if the defendant could not be brought before the court, the second question would not arise. Having cited The Siskina, Bremer Vulkan, Laker, South Carolina and P v Liverpool Daily Post and Echo Newspapers Plc [1991] 2 AC 370 as having endorsed The Siskina with an added modification, Lord Mustill said at p 298F-G that "[i]n their Lordships' opinion it would not be permissible for this Board to contemplate a further modification of the principles enunciated by the House of Lords in these authorities, still less a complete departure from them, unless a decision on their correctness or otherwise was indispensable to the determination of the present appeal".

166.
Dealing with the enforcement gateway (which provided under Hong Kong RSC Order 11, rule 1(1)(m) that "service of a writ out of the jurisdiction is permissible with the leave of the court if in the action begun by the writ … (m) the claim is brought to enforce any judgment or arbitral award"), Lord Mustill said that there was 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". He rejected the enforcement gateway's application on the grounds that the claim was not "brought to enforce" a judgment, and the injunction would not enforce a judgment, but was intended to hold the position until a judgment came into existence.

167.
In dealing with the injunction gateway at p 299D-E, Lord Mustill said that Mercedes had argued that Order 11, rule 1(1)(b) "expressly posits an injunction ordering the defendant to do or refrain from doing anything within the jurisdiction" and that was "exactly what a Mareva injunction does do". But he held that that was not the right approach: "[i]t is not enough simply to read the words of the rule and see whether, taken literally, they are wide enough to cover the case. Regard must be paid to their intent, their spirit: see, for example, Johnson v Taylor Bros & Co Ltd [1920] AC 144, 153, per Viscount Haldane and GAF Corpn v Amchem Products Inc [1975] 1 Lloyd's Rep 601, 605, per Megarry J and the cases there cited."

168.
Lord Mustill then embarked upon a discussion of the rationalisation for the Mareva injunction at pp 300-301. He prefaced that analysis by saying, at p 299, that:

“[i]deally, to match an application for Mareva relief against the spirit of Order 11, rule 1, the first step would be to ascertain, not only what a Mareva injunction does, but also how, juristically speaking, it does it.”

That should be straightforward, but was not, because after “only a few years the development of a settled rationale was truncated by the enactment of section 37(3)”, which assumed that the remedy existed, and tacitly endorsed its validity. He rejected the rationalisations found in each of the Mareva case itself and in the Pertamina case. He said that not only in The Siskina but also in the subsequent decisions of the House of Lords, it was laid down that the statement of Cotton LJ in North London Railway was right and that the wider interpretation of the statutory power was not. On the face of it, he said that “this would appear to negative the only surviving basis for the jurisdiction, unless the Mareva injunction is, like the relief granted in [South Carolina], a special exception to the general law”.

169.
Lord Mustill observed that the most that could be said was that, whatever its precise status, the Mareva injunction is a quite different kind of injunction from any other. It was sui generis, as was the injunction inhibiting foreign proceedings in South Carolina. It was not enough simply to say that since a Mareva injunction is an injunction it automatically fell within the injunction gateway, and that:

“the special feature that it is not concerned with any rights justiciable within the home territory is merely one of the factors to be taken into account in the exercise of the discretion to grant leave. Rather, it must be asked whether an extra-territorial jurisdiction grounded only on the presence of assets within the territory is one which sub-paragraph (b) and its predecessors were intended to assert. Their Lordships are satisfied that it is not.”

170.
Lord Mustill said that the purpose of Order 11 was:

“to authorise the service on a person who would not otherwise be compellable to appear before the English court of a document requiring him to submit to the adjudication by the court of a claim advanced in an action or matter commenced by that document. Such a claim will be for relief founded on a right asserted by the plaintiff in the action or matter, and enforced through the medium of a judgment given by the court in that action or matter. The document at the same time defines the relief claimed, institutes the proceedings in which it is claimed, and when properly served compels the defendant to enter upon the proceedings or suffer judgment and execution in default. Absent a claim based on a legal right which the defendant can be called upon to answer, of a kind falling within Order 11, rule 1(1), the court has no right to authorise the service of the document on the foreigner, or to invest it with any power to compel him to take part in proceedings against his will.”

He went on, at p 302, to say that Order 11 was confined to originating documents which set in motion proceedings designed to ascertain substantive rights, as borne out by its language defining the extra-territorial jurisdiction by reference to the relief claimed in “the action begun by the writ”, which referred to a claim for substantive relief which would be the subject of adjudication in the action initiated by the writ, and not to proceedings which were merely peripheral and, what is more, peripheral to an action in a foreign court concerning issues which could not be brought before the

English court. This was confirmed by the requirement for an affidavit stating the belief of the deponent that the claimant had a good cause of action.

171.
At pp 303-304, Lord Mustill rejected arguments as to the breadth of the injunction gateway by analogy with quia timet injunctions, and the challenge to The Siskina, concluding that the second question did not, therefore, arise for decision. He observed only that "[i]t may well be that in some future case where there is undoubted personal jurisdiction over the defendant but no substantive proceedings are brought against him in the court", an attempt will be made to obtain Mareva relief in support of a claim pursued in a foreign court. He said that if the considerations explored in Lord Nicholls' dissenting judgment were then to prevail, the availability of relief would depend upon the ability to serve the defendant personally. He suggested, at pp 304-305, that the Rules Committee might then consider whether to enlarge Order 11.

172.
Lord Nicholls dissented in Mercedes. CCL places great emphasis on his reasoning. Lord Nicholls, at p 305, began by reversing the two questions stated by Lord Mustill, placing the "power" question first, and saying that the answer to the "power" question provided "the basis essential to any consideration of" the second "service out" question.

173.
Lord Nicholls dealt with the "power" question at pp 305-306 saying that Mareva relief differed from other interim relief in that it was not connected with the subject matter of the cause of action in issue in the proceedings. It was not "so much relief appurtenant to a money claim as relief appurtenant to a prospective money judgment". It was "relief granted to facilitate the process of execution or enforcement which will arise when, but only when, the judgment for payment of an amount of money has been obtained". Once it was seen that it was a protective measure in respect of a prospective enforcement process, then, at pp 306-307:

"it can be seen there is a strong case for Mareva relief from the Hong Kong court being as much available in respect of an anticipated foreign judgment which would be recognised and enforceable in Hong Kong as it is in respect of an anticipated judgment of the Hong Kong court itself."

174.
In considering The Siskina, at pp 307-308, Lord Nicholls said that the two questions he had identified "were not considered and addressed separately", Mareva injunctions were in their infancy, and their scope had been broadened to include post-judgment and worldwide orders. The subsequent House of Lords' decisions allowed the jurisdiction to be seen in its wider international context:

"As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester-year."

175.
At p 309, relying on Channel Tunnel, Lord Nicholls said that the Hong Kong court would have jurisdiction to grant interlocutory relief where two Hong Kong residents entered into a contract with an exclusive foreign jurisdiction clause. Since the question of whether the defendant would insist on his right to have the case tried abroad was irrelevant in Channel Tunnel, as Lord Mustill had himself

said, it must be even more irrelevant “for Mareva relief in respect of a prospective foreign judgment which will be enforceable in Hong Kong”.

176.
Lord Nicholls, therefore, concluded, at p 310, on the first “power” question that the boundary line of the Mareva jurisdiction was “to be drawn so as to include prospective foreign judgments which will be recognised and enforceable in the Hong Kong courts”, and “[a] writ, claiming Mareva relief and nothing further, could have been issued and served on him in Hong Kong”. That conclusion informed the second question.

177.
Lord Nicholls then faced squarely the question of whether a writ seeking only a Mareva injunction in respect of an anticipated foreign judgment fell foul of the requirement for it to be based on a cause of action. He concluded, at pp 310-312, that it did not for a variety of reasons including the circularity of the argument, the ability to grant an injunction where the conduct was unconscionable (as in Laker), the grant of discovery orders under the principle in Norwich Pharmacal Co v Customs and Excise Comrs [1974] AC 133 (“Norwich Pharmacal”), and the difficulty of seeing any “reason in principle why … where the defendant is within the territorial jurisdiction of the court, the court should decline to give such interim relief as might have been given had the court been determining the substantive dispute”. Channel Tunnel had shown the way ahead. Lord Diplock had been wrong to say that the right to obtain an interlocutory injunction was dependent upon there being a pre-existing cause of action. That was inconsistent with a Mareva injunction being ancillary to a prospective right of enforcement. Since Mareva injunctions were on any analysis anticipatory, there was no obvious reason why it should be an essential prerequisite in all cases that the underlying cause of action must have already accrued. The point went to discretion not jurisdiction, and Veracruz was wrong.

178.
Lord Nicholls, at p 313, described the second “service out” question as a short point of interpretation. Since he had concluded that a writ claiming Mareva relief alone could have been issued and served on Mr Leiduck in Hong Kong, such relief was not interim relief in the sense relevant for Order 11, rule 1(1)(b) purposes. It was granted pending judgment in other proceedings. The basis on which service out was refused in The Siskina disappeared once one understood that a claim for a Mareva injunction could stand alone in an action as a form of relief granted in anticipation of and to protect enforcement of a judgment yet to be obtained in other proceedings. It was not interim relief in the sense relevant for the purposes of the injunction gateway. It was sensible and reasonable to regard a Mareva injunction in aid of a prospective judgment being sought from another court as within the injunction gateway. He said, at pp 313-314:

“The alternative result would be deeply regrettable in its unfortunate impact on efforts being made by courts to prevent the legal process being defeated by the ease and speed with which money and other assets can now be moved from country to country.”

There was no need to leave the matter to the Rules Committee.

Fourie v Le Roux [2007] 1 WLR 320 (“Fourie”)

179.
In Fourie, the liquidator of South African companies applied for a freezing injunction against individuals and companies who were alleged to have fraudulently removed the companies’ assets to England. The substantive claims were to be brought in South Africa. The House of Lords held that a

court had jurisdiction to grant an injunction where it had in personam jurisdiction over the person against whom it was sought and that a freezing injunction might be granted and served before substantive proceedings had been instituted. In general, however, a freezing order would not be properly made without notice unless the case for substantive relief was formulated.

180.
Lord Scott began at para 25 by indicating that the question was not whether the court had strict jurisdiction. It did because the defendants were present in England and were properly served with an originating summons. The question was whether such an injunction could properly be granted.

181.
Having considered all the House of Lords' decisions already mentioned, Lord Scott said at para 30 that "[t]he practice regarding the grant of injunctions, as established by judicial precedent and rules of court, has not stood still since The Siskina … was decided and is unrecognisable from the practice to which Cotton LJ was referring in North London Railway". He thought that "Mareva injunctions could not have been developed and become established if Cotton LJ's proposition still held good". Once the service out in The Siskina had been set aside, there was no jurisdictional basis on which the grant of the injunction could be sustained. Lord Scott thought, at para 31, that the injunction would now be granted, if service out was permitted, because of section 25 of the Civil Jurisdiction and Judgments Act 1982 (see para 198 below): "[t]he consequence of this, in relation to the present case, is … to settle the question of jurisdiction, in its strict sense". The judge should, as a matter of good practice, pay careful attention to the substantive relief that is, or will be, sought. The protection for the defendant that ought to be associated with the grant of a without notice freezing order ought to include directions about the institution of proceedings for substantive relief.

Cartier International AG v British Sky Broadcasting Ltd (Open Rights Group intervening) [2017] 1 All ER 700 ("Cartier")

182.
In Cartier, the Court of Appeal extended the circumstances in which an injunction might be granted. It held that it had power to grant mandatory injunctions under section 37 against an internet service provider, requiring it to block access to websites that infringed UK registered trademarks. Kitchin LJ at paras 40 et seq reviewed the authorities since The Siskina, and the jurisdictional basis for the grant of injunctions enunciated in Spry on Equitable Remedies, 5th ed (1997), p 323, and the 9th ed (2014), p 333.

183.
Kitchin LJ concluded at 54 by recognising that internet service providers were not guilty of any wrongdoing, but rejected the submission that the power of the court to grant injunctions was limited to the particular situations described in The Siskina or by Lord Brandon in South Carolina: "[t]hat would impose a straitjacket on the court and its ability to exercise its equitable powers which is not warranted by principle". Kitchin LJ said that the preferable analysis involved a recognition of the great width of those equitable powers and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate.

Which of the "power" or "service out" issues should be considered first?

184.
It will have been seen from my description of the decision in Mercedes that Lords Mustill and Nicholls diverged as a matter of principle on which of the two issues before the court in that case (as in this)

should come first. Lord Mustill thought that, as a matter of principle, the first question was service out, because if the defendants could not be served, no issue arose as to the power to grant a Mareva injunction. Lord Nicholls considered that the question of whether or not the court had power to grant a freezing injunction informed the issue as to the proper meaning of the injunction gateway.

185.
The situation in this case is slightly different because Broad Idea is in any case amenable to the jurisdiction of the BVI court. Since, however, no substantive claim has been articulated against Broad Idea, this factor does not create a real distinction. It will be recalled from the above summary of Lord Scott's judgment in Fourie that, for the protection of the defendant, a freezing order ought to include directions about the institution of proceedings for substantive relief. Since no substantive relief has ever been intimated against Broad Idea, the grant of a Mareva injunction against it could, as CCL effectively accepted, only be on the basis of it being regarded as either a creature or money box of Dr Cho, by analogy with Chabra. The claim against Dr Cho is, therefore, in my view, to be regarded as the primary claim in these appeals.

186.
Moreover, what Lord Bingham (with whom Lords Mackay, Nicholls and Hobhouse of Woodborough agreed) said in Donohue v Armco Inc [2001] UKHL 64; [2002] 1 All ER 749, para 21 is to be recalled in this connection. As he explained: "[t]he jurisdiction of the English court is territorial. A party resident abroad may be subjected to the jurisdiction of the court to the extent (and only to the extent) that statute or rules made under statute permit".

187.
Dr Cho does, of course, have assets in the BVI in the form of his 50.1% shareholding in Broad Idea. If he did not, the case would not have been brought. In these circumstances, it is appropriate to decide first the question of whether Dr Cho can be properly served with any BVI process. In considering this question, however, it will be necessary to bear in mind the developments in the law since The Siskina that I have summarised above.

188.
It is to be noted also that on 31 December 2020, the BVI legislature inserted (by section 3 of the Eastern Caribbean Supreme Court (Virgin Islands) (Amendment) Act 2020) a new section 24A into the Eastern Caribbean Supreme Court Act 1969 (which came into force on 7 January 2021), to provide that the High Court may grant interim relief where proceedings have been or are about to be commenced in a foreign jurisdiction, and to allow (by section 24A(4)) interim relief to be granted against a NCAD (see the statutory provisions set out at paragraph iv of the Appendix). No provision has, however, yet been made in the BVI to provide a specific gateway for stand-alone freezing injunctions to be served out of the jurisdiction (but see paragraph ix of the Appendix for the new provision of the CPR in England and Wales).

<u>The service out issue: Does the injunction gateway in EC CPR Part 7.3(2)(b) allow service out of a claim for a freezing injunction alone on Dr Cho?</u>

189.
Both the House of Lords and the Privy Council have decided that the injunction gateway does not allow a free-standing claim to a Mareva injunction to be served out of the jurisdiction. Mercedes is binding authority, from which the Privy Council should only rarely depart where it is satisfied that the principle laid down was wrong (see Lewis v Attorney General of Jamaica [2001] 2 AC 50, 75 per Lord Slynn, and Gibson v Government of the United States of America [2007] 1 WLR 2367, paras 37-40,

where Lords Hoffmann, Carswell, and Mance suggested requiring “exceptional circumstances” and “some special reason”).

190.
In my opinion, there is no good reason for the Board to depart from its previous view of what Lord Nicholls described as a short point of interpretation. There are several reasons for this approach as follows.

191.
The first reason concerns the terms of the Rules themselves. EC CPR Part 7.1(1) provides that Part 7 contains;

“provisions about the -

(a) circumstances in which court process may be served out of the jurisdiction; and (b) procedure for serving court process out of the jurisdiction.”

EC CPR Part 7.1(2) provides that:

“references to service or filing copies of the claim form include -

(a) the statement of claim (unless contained in the claim form);

(b) an affidavit in support of the claim, if these Rules so require; and

(c) if permission has been given under rule 8.2 to serve the claim form without the statement of claim - a copy of the order giving permission.”

192.
EC CPR Part 7.2 provides that:

“A claim form may be served out of the jurisdiction only if (a) rule 7.3 allows; and (b) the court gives permission.”

EC CPR Part 7.3(1) provides that:

“The court may permit a form to be served out of the jurisdiction if the proceedings are listed in this rule.”

Under the heading “Features which may arise in any type of claim”, EC CPR Part 7.3 provides that:

“A claim form may be served out of the jurisdiction if a claim is made

…

(b) for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction.”

193.
EC CPR Part 7.5(1) provides that:

“An application for permission to serve out of the jurisdiction may be made without notice but must be supported by evidence on affidavit stating (a) the grounds on which the application is made; (b) that in the deponent’s belief the claimant has a claim with a realistic prospect of success …”

EC CPR Part 7.5(2) provides that:

“An order granting permission to serve the claim form out of the jurisdiction must state the periods within which the defendant must (a) file an acknowledgement of service in accordance with Part 9; and (b) file a defence in accordance with Part 10.”

194.
In relation to “Service of court process other than claim form”, EC CPR Part 7.14(1) provides that:

“An application, order or notice issued, made or given in any proceedings may be served out of the jurisdiction without the court’s permission if it is served in proceedings in which permission has been given to serve the claim form out of the jurisdiction.”

195.
The definitions of “claim” and “claim form” in EC CPR Part 2.4 apply to all the above rules: “‘claim’ is to be construed in accordance with Part 8” and “‘claim form’ is to be construed in accordance with Part 8”. Part 8 provides detailed rules for the commencement of substantive proceedings. EC CPR Part 8.1(1) provides that:

“A claimant starts proceedings by filing in the court office the original and one copy (for sealing) of (a) the claim form; and (subject to rule 8.2) (b) the statement of claim; or (c) if any rule or practice direction so requires - an affidavit or other document.”

EC CPR Part 8.2(1) provides that:

“A claim form may be issued and served without the statement of claim or affidavit or other document required by rule 8.1(1)(b) or (c) only if the (a) claimant has included in the claim form all the information required by rules 8.6, 8.7, 8.8 and 8.9; or (b) court gives permission.”

EC CPR Part 8.2(6) and (7) provide that:

“(6) Any order giving permission for the claim form to be served without a statement of claim or affidavit or other document required by rule 8.1(1)(b) or (c) must state a date by which that document must be served.

(7) Such date must in no case be more than 56 days from the date of issue of the claim form.”

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”. A claim form can be issued and served without a statement of claim only if a date is stated by which it must be served. It is clear that EC CPR Part 7.3(2)(b) is referring to a substantive claim and a substantive claim form “for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction”.

197.
The second reason why I take the view that the injunction gateway in EC CPR Part 7.3(2)(b) does not allow service out of a claim for a freezing injunction alone is that the EC CPR were enacted in 2000 some five years after the Privy Council’s decision in Mercedes. The drafters must be taken to have

been well aware of the Board's reasoning, yet they chose rules in substantially the same form as the Hong Kong rules in issue in Mercedes. The drafters must have known that the Privy Council was of the opinion that rules in this form would be construed as only authorising the service on a person outside the jurisdiction of "originating documents which set in motion proceedings designed to ascertain substantive rights" … and not of "proceedings which are merely peripheral … to an action in a foreign court concerning issues which could not be brought before the [BVI] court" ([1996] AC 284, 302). In short, the EC CPR was drafted in the knowledge that Part 7.3(2)(b) would not allow service out of a stand-alone claim for a freezing injunction.

198.
The third reason, in my judgment, is that nothing has changed since the EC CPR was drafted in the knowledge of Lord Mustill's reasoning in Mercedes. Indeed, the drafters of the EC CPR would have known in 2000 that it was possible to legislate to allow for the grant of free-standing Mareva injunctions as had already by then happened in other jurisdictions. Section 25 of the Civil Jurisdiction and Judgments Act 1982 had come into effect on 1 January 1987 and had enabled the High Court in England and Wales to grant interim relief in support of claims made in courts other than those in England and Wales. The Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/302), which came into force on 1 April 1997, enlarged the power of the High Court in England and Wales under section 25(1) to grant interim relief in aid of legal proceedings in other countries beyond those taking place in countries that were party to the 1968 Brussels Convention or the 1988 Lugano Convention. Para 3.1(5) of CPR PD 6B allowed service out of a claim form where a "claim is made for an interim remedy under section 25(1) of the Civil Jurisdiction and Judgments Act 1982". That provision had first been introduced immediately following Mercedes as Order 11, rule 8A by paragraph 2 of the Rules of the Supreme Court (Amendment) (SI 1997/415), and also came into force on 1 April 1997.

199.
Fourthly, the argument that Lord Mustill's reasoning on the service out issue in Mercedes was influenced by the opinion of Lord Diplock on the power issue in The Siskina is wrong. In fact, as I have said, Lord Mustill assumed in his reasoning in Mercedes that The Siskina had been wrong to decide that a freezing injunction could not be granted in support of proceedings in a foreign court (Lord Mustill at p 297).

200.
Fifthly, the authorities in other jurisdictions relied upon by CCL do not, in my view, assist it. The courts in Jersey in Solvalub Ltd v Match Investments Ltd [1998] ILPr 419, Krohn GmbH v Varna Shipyard (No 2) (1997) 1 OFLR 482 and State of Qatar v Al Thani [1999] JLR 118 expressly departed from Mercedes, which I do not feel able to do. Conversely, the Cayman Islands' Court of Appeal in VTB Capital plc v Malofeev [2011] 2 CILR 420 held that, although it had power under new legislation to grant a freestanding freezing injunction, it had no power to grant permission for the service of an application for such an injunction out of the jurisdiction under the Cayman Injunction Gateway (Order 11, rule 1(1)(b)). The Court said at para 22 that "there is nothing in the judgments in the Royal Court in Jersey which should lead this court to the conclusion that courts in this jurisdiction can properly disregard the law as expounded in the Mercedes case". In Cayman too, the legislature responded by enacting Order 11A of the Grand Court Rules to permit service out of the jurisdiction of an application for a freestanding freezing order.

201.

In my view, it is now too late to reverse the decision in Mercedes. Legislatures around the Commonwealth have taken differing legislative approaches to the law that was laid down in Mercedes. It would spread confusion and the need for yet further legislative change if the Board were now to reverse what was decided first some 42 years ago, and was then authoritatively reiterated in Mercedes 17 years later.

The power issue: Does the court have power at common law to grant a freezing injunction against a defendant in aid of foreign proceedings, when no substantive claim is made against that defendant in proceedings before the domestic court?

202.
I note first the view that Lord Mustill expressed in Mercedes to the effect that it would not be permissible to contemplate a complete departure from the reasoning in The Siskina and the subsequent House of Lords' cases unless such a decision was indispensable to the determination of the case before it.

203.
CCL has, nonetheless, invited the Board to hold that Lord Diplock's reasoning was fundamentally flawed, and to uphold Lord Nicholls's approach to the rationale for the grant of Mareva relief. That rationale, as I have said, is that freezing injunctions are ancillary to a prospective right of enforcement to which the claimant may become entitled in the jurisdiction in question. The majority of the Board has acceded to CCL's invitation. I have, however, reached the conclusion that it would be unwise to seek to put the clock back to 1977.

204.
There are a number of reasons. First, certainty and consistency in the common law are of great value to the international commercial community. Secondly, the reasoning in The Siskina has not in fact impeded the development of the common law as it affects the grant of interim injunctions. I shall return to this point. Thirdly, different jurisdictions have legislated in different ways to cater for their own perceived commercial requirements. It was clear after The Siskina that legislation would be necessary if it were thought desirable to be able to grant freezing injunctions in aid of foreign proceedings or arbitration, and to allow service out of claims for such relief. Fourthly, Lord Neuberger said in Knauer v Ministry of Justice [2016] UKSC 9; [2016] AC 908, paras 22-23 (citing Lord Bingham in Horton v Sadler [2007] 1 AC 307, para 29) that more is required for the Supreme Court to overturn one of its prior decisions than simply that the court would have decided it differently, even though, as Lord Bingham had also said at para 29: "while former decisions of the House are normally binding … too rigid adherence to precedent may lead to injustice in a particular case and unduly restrict the development of the law" (see also the cases cited in para 189 above).

205.
As regards the development of the common law in relation to the grant of interim relief since The Siskina, I have already summarised the most important cases. It was recognised in those cases that substantive changes have been made to the position as it appeared to be immediately after The Siskina. I can give just a few examples that demonstrate that the law has indeed developed since The Siskina, even if not quite in the way that Lord Nicholls might have wished.

206.
The decision in North London Railway has been authoritatively explained in Masri and Tasarruf. Its true ratio was that the words "just or convenient" in section 25(8) did not **increase** the power of the court or the rights of parties so as to give rights which did not exist before the 1873 Act. But, as I

have said, that says nothing about what legal or equitable rights might in the future exist. The common law develops dynamically to meet new cultural and commercial situations. The decision in Cartier is a good example of such a development. The ability of the court to grant internet blocking orders was not impeded by North London Railway. It is obvious that such orders would have been unintelligible to Cotton LJ and even to Lord Diplock. As Lawrence Collins LJ made clear in Masri, North London Railway is and was not authority for the proposition that section 25(8) gave no power to the court to grant an injunction in a case where no court could have granted one before the 1873Act.

207.
Secondly, in my view, the ratio of The Siskina was simply that service out would not be allowed under RSC Order 11, rule 1(1)(i) on a foreign corporation in respect of a stand-alone Mareva injunction. Lord Diplock's reasoning relating to the impact of North London Railway and his own view of the ratio of The Siskina has been explained and modified in subsequent cases.

208.
Thirdly, Laker qualified the reasoning in The Siskina following Casthano. It suggested that the width and flexibility of equity was not to be undermined by categorisation. Whilst caution was required, an injunction could be granted against a party properly before the court, where it was appropriate to avoid injustice.

209.
This flexibility was picked up in South Carolina where Lord Brandon said that, in addition to Mareva injunctions (which were by then dealt with in statute) and anti-suit injunctions, injunctions could be granted (i) in situations where a party had invaded, or threatened to invade, another's legal or equitable right for the enforcement of which the party was amenable to the jurisdiction of the court, and (ii) where one party to an action had behaved, or threatened to behave, in an unconscionable manner.

210.
Channel Tunnel made clear that The Siskina had not imposed a requirement that an interim injunction could not be granted unless it was ancillary to a claim for substantive relief to be granted by the English court, even though personal jurisdiction over the defendants and a cause of action under English law were required.

211.
Finally, Fourie concluded that the practice and rules of court in relation to interim injunctions had not stood still since The Siskina. The jurisdictional issue had been settled by legislative amendment in England and Wales, but the court should still pay close attention in granting a free-standing Mareva injunction in support of foreign proceedings to the substantive relief that is, or would be, sought.

212.
In argument, counsel and the Board raised two questions. First whether the rationale for the grant of a freezing order adumbrated by the High Court of Australia in Cardile v Led Builders Pty Ltd (1999) 198 CLR 380 ("Cardile") and PT Bayan Resources TBK v BCBC Singapore Pte Ltd (2015) 258 CLR 1 was preferable to that indicated by Lord Nicholls in Mercedes. The High Court of Australia at para 41 of Cardile had cited with approval the joint judgment of Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ in Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (1998) 195 CLR 1, para 35 to the effect that: "The Mareva injunction is the paradigm example of an order to prevent the frustration of a court's process". Secondly, counsel and the Board asked how the current law

affected the service out of injunctions to restrain the presentation of petitions to wind up companies within the jurisdiction and Norwich Pharmacal orders.

213.
As to the first question, I do not think it appropriate, for the reasons already given, to replace Lord Mustill's reasoning in Mercedes with that of Lord Nicholls. The law has moved on. Legislatures have reacted to Mercedes. It would, as I have said, throw the common law into uncertainty to seek to unwind its development back to 1996. Moreover, I would echo the comments made, as already mentioned, by Lord Mustill in Mercedes at p 299 as follows:

"Ideally, to match an application for Mareva relief against the spirit of [RSC Order] 11, rule 1, the first step would be to ascertain, not only what a Mareva injunction does, but also how, juristically speaking, it does it. This should be straightforward, but is not. After only a few years the development of a settled rationale was truncated by the enactment of [section 37(3)]. This did not, as is sometime said, turn the common law Mareva injunction into a statutory remedy, but it assumed that the remedy existed, and tacitly endorsed its validity."

214.
On the second point, I do not think it appropriate to review areas of law that do not arise in this case. This applies as much to questions of service out of applications to restrain the presentation of petitions to wind up companies within the jurisdiction, as it does to service out of Norwich Pharmacal orders, and to the correctness of the Court of Appeal's decision in Veracruz. On the latter point, however, I would note the Court of Appeal's more recent approach to the grant of a freezing injunction in aid of contribution proceedings in Kazakhstan Kagazy Plc v Zhunus [2016] EWCA Civ 1036. In that case, Longmore LJ held at paras 25-26 that an injunction could be granted despite the fact that no cause of action in the strict sense yet existed.

215.
There is one further reason why it is not, in my opinion, appropriate for the Board to decide the power issue in this case. Once it is established, as the Board has decided, that these proceedings cannot be served out of the BVI on Dr Cho, the only remaining claim is the one made against Broad Idea for a freezing injunction. As I have said, there is no substantive claim anywhere against Broad Idea. In these circumstances, one can see from the second judgment of the ECCA that (a) there was, on the facts, no sufficient basis for the conclusion that Broad Idea was merely holding assets to which Dr Cho was beneficially entitled, (b) Broad Idea's assets were not amenable to any process of execution to satisfy any judgment that might be obtained against Dr Cho in Hong Kong, and (c) that there was therefore no basis for Adderley J's finding of a risk of dissipation. The parties submitted further written argument after the hearing directed to these issues. I have reached the clear view that the Board has no basis to interfere with the factual conclusions reached by the ECCA at paras 57 and 61, notwithstanding the decision of the Hong Kong Court of Appeal to overturn the decision of Harris J and to impose a worldwide freezing order on Dr Cho.

216.
In relation to the submissions of the parties on the sustainability of the so-called Black Swan jurisdiction, CCL submitted that the ECCA was wrong, as a matter of precedent, to decide that an order of the kind made in Black Swan was unavailable in law, since Bannister J's decision in Black Swan had been upheld by the ECCA in Yukos CIS Investments Ltd v Yukos Hydrocarbons Investments Ltd (HCVAP 2010/028) (unreported) 26 September 2011, at paras 147-148. Whether or not that is the

case, I think the Board needs only to address the issue as a matter of principle on the basis of the decisions cited.

217.
The ECCA held in this case that Bannister J in Black Swan had misunderstood what Lord Mustill had said at p 304G in Mercedes about what might happen in a future case where there was undoubted personal jurisdiction over the defendant (as there is here against Broad Idea), but no substantive proceedings against it within the jurisdiction. The ECCA said that Bannister J had wrongly interpreted Lord Mustill as saying that in such a case an injunction might be granted on the basis adumbrated by Lord Nicholls, even if there were no substantive proceedings against the local defendant anywhere. I agree. Lord Mustill, as already said, observed that "[i]t may well be that in some future case where there is undoubted personal jurisdiction over the defendant but no substantive proceedings are brought against him in the court", an attempt would be made to obtain Mareva relief **in support of a claim pursued in a foreign court**. He did not suggest that Mareva relief could be granted against a person against whom there was no claim made anywhere.

218.
As it seems to me, however, there could, in an appropriate case, be power at common law following the approach in Channel Tunnel, Fourie and Chabra to grant an interim or Mareva injunction against a defendant properly served within the jurisdiction, where there was either (a) an actual or threatened substantive claim against that defendant in foreign proceedings or in arbitration (see paras 160, 162, 181 and 210 above) or (b) a sustainable claim on Chabra grounds that the defendant within the jurisdiction is the creature or money box of a defendant against whom there is an actual or threatened foreign claim or arbitration. Neither of those two situations has, however, for reasons I have given, arisen in this case in respect of Broad Idea.

The majority's judgment

219.
Since drafting this judgment, I have had the benefit of reading in draft Lord Leggatt's judgment (with which the majority of the Board agrees). We do not disagree on the outcome of the appeals. We do, however, disagree on whether it is appropriate to decide the legal question arising under the power issue.

220.
I have considerable sympathy with the erudite and compelling exposition of how, rationally, the common law affecting the grant of freezing and other interlocutory injunctions ought to have developed had The Siskina been decided differently. My concerns are, however, threefold.

221.
First, the legal questions that the majority wishes to decide do not actually arise for decision on these appeals because of (a) the Board's unanimous decision on the service out issue, and (b) the facts found in the court below which the Board is unanimously unwilling to disturb. Accordingly, the majority's ground-breaking exposition of the law of injunctions will not, as a matter of precedent, be binding on lower courts, but will be powerful obiter dicta. That, in my judgment is an unsatisfactory way to change the law in such an important area. I understand that, in one sense, the importance of the subject is precisely the reason why the majority feel so strongly that they should subscribe to the views expressed by Lord Leggatt. But I am concerned that the result will be a lack of clarity in many jurisdictions as to the consequences of such obiter dicta. These consequences have certainly not been the subject of argument before us.

222.
Secondly and relatedly, I am concerned that the Board has not heard detailed argument on the effect that the majority's approach would have in several jurisdictions which have changed their laws in response to the decisions in The Siskina and Mercedes. The majority's judgment may, therefore, have unpredicted and unknown consequences.

223.
Thirdly, I am concerned that the majority has gone further than simply to explain and endorse the subsequent developments of the law enunciated by the courts since The Siskina, which is what I have sought to do. I understand Lord Leggatt's view that it would be "putting the clock back if the Board were now to lend any credence to the notion that [Lord Diplock's statements in The Siskina] remain good law". But Lord Leggatt has sought to provide a juridical foundation for the entire law of freezing and interlocutory injunctions, when the argument before us was limited (at most) to freezing injunctions in general and the circumstances of this case in particular. As I have already said, there are dangers in seeking to develop the common law in this way, however attractive it may be to the judges of a particular generation to do so. The main dangers are uncertainty in the common law, the effects caused by legislation in different jurisdictions having been drafted on the premise of a newly invalidated legal foundation, and deviation from the doctrine that previous decisions should only be departed from where it is essential to do so to decide the case before the court. I fear that it may take more litigation to sort out the ramifications of the majority's decision. Whilst the process I advocate may be slower, it has the benefit of allowing the common law to develop incrementally according to the cases that come before the courts for decision. I entirely endorse Lord Leggatt's desire to secure stability, consistency, certainty and predictability in the common law. We disagree only as to the best way in which that can be achieved.

Conclusions

224.
For the reasons already given, I have concluded that CCL's appeal against the ECCA's decision on the service out issue must fail in the light of the decision in Mercedes. I have not found it necessary, in those circumstances, to decide the power issue. CCL has not persuaded me that the Board should overturn the ECCA's decision on the facts as it affects Broad Idea.

225.
In the light of the views I have expressed and the views of the majority of the Board expressed by Lord Leggatt, their Lordships will humbly advise Her Majesty that both CCL's appeals should be dismissed.

Appendix

Statutory power to grant an injunction

i)
In the BVI, the relevant provision is section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act Cap 80, 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 and conditions as the court or judge thinks just."

ii)

In England and Wales, section 25(8) of the Supreme Court of Judicature Act 1873 (considered in North London Railway) provided that:

“An injunction may be granted … by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made.”

iii)
Now in England and Wales section 37(1) of the Senior Courts Act 1981 provides that:

“The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.”

Statutory reform of the power to grant an injunction in aid of foreign proceedings

iv)
In the BVI, section 3 of the Eastern Caribbean Supreme Court (Virgin Islands) (Amendment) Act 2020 inserted a new section 24A into the Eastern Caribbean Supreme Court Act 1969. It provided that:

“(1) The High Court or a judge thereof may grant interim relief where proceedings have been or are about to be commenced in a foreign jurisdiction.

(2) On an application for any interim relief under subsection (1) the High Court or a judge thereof may refuse to grant such relief if, in the opinion of the High Court or a judge thereof, (a) it has no jurisdiction, apart from this section, in relation to the subject-matter of the proceedings in a foreign jurisdiction; and (b) it is inexpedient in the circumstances for the High Court or a judge thereof to grant such relief.

(3) Subsection (1) applies notwithstanding that (a) the subject matter of the proceedings in a foreign jurisdiction would not, apart from this section, give rise to a cause of action over which the High Court or a judge thereof would have jurisdiction …

(4) In this section ‘interim relief’, includes any relief which the High Court or a judge thereof has power to grant in proceedings relating to matters within its jurisdiction, as well as, an order against a non-cause of action defendant.”

v)
In England and Wales section 37(3) of the Senior Courts Act 1981 provides that:

“The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within, that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.”

vi)
Section 25 of the Civil Jurisdiction and Judgments Act 1982 came into force on 1 April 1987 as follows:

“(1) The High Court in England and Wales … shall have power to grant interim relief where - (a) proceedings have been or are to be commenced in a contracting state other than the United Kingdom …; and (b) they are or will be proceedings whose subject-matter is within the scope of the 1968 Convention …

(2) On an application for any interim relief under subsection (1) the court may refuse to grant that relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in

relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it."

vii)
The Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/302), which came into force on 1 April 1997, provided that:

"The High Court in England and Wales … shall have power to grant interim relief under section 25(1) of the Civil Jurisdiction and Judgments Act 1982 in relation to proceedings of the following descriptions, namely - (a) proceedings commenced or to be commenced otherwise than in a Brussels or Lugano contracting state; (b) proceedings whose subject-matter is not within the scope of the 1968 Convention as determined by article 1 thereof."

Statutory reform of the injunction gateway

viii)
In BVI, there has, as yet, been no new statute introducing a gateway for interim or freezing injunctions.

ix)
In England and Wales, paragraph 3.1(5) of CPR PD 6B allows service out of a claim form where a "claim is made for an interim remedy under section 25(1) of the Civil Jurisdiction and Judgments Act 1982". That provision had first been introduced immediately following Mercedes as Order 11, rule 8A by paragraph 2 of the Rules of the Supreme Court (Amendment) (SI 1997/415), and came into force on 1 April 1997.