IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA 9 of 2011
(FSD 141 of 2011 PCJ)

BEFORE

The Rt Hon Sir John Chadwick, President
The Hon E. Mottley, Justice of Appeal
The Rt Hon A. Campbell, Justice of Appeal

BETWEEN

VTB CAPITAL PLC

Plaintiff/Appellant

- and -

KONSTANTIN MALOFEEV
UNIVERSAL TELECOM MANAGEMENT
UNIVERSAL TELECOME INVESTMENT STRATEGIES FUND SPC

Defendants

Mr Nigel Meeson QC instructed by Conyers Dill and Pearman appeared for the Appellant
The defendants were not represented

Hearing Date: 17 November 2011
Judgment: 30 November 2011

JUDGMENT
Revised from transcript and Approved

Sir John Chadwick, President:

1. These proceedings were commenced by the issue of a generally endorsed writ on 11 August 2011. The plaintiff (VTB Capital PLC) is a bank having its registered office in London. The first named defendant, Konstantin Malofeev, is a Russian citizen based, it is said, in Moscow. The second and third named defendants, respectively Universal Telecom Management and Universal Telecome Investment Strategies Fund SPC, are companies incorporated in the Cayman Islands. The third named

defendant, as its name suggests, is a segregated portfolio company. The second named defendant is an exempted company.

2. The writ is endorsed with a claim against Mr. Malofeev for an injunction restraining him:

> "... until the final determination of proceedings between the Plaintiff and the Defendant before the High Court of Justice, Chancery Division, in London, England, which have been assigned Claim Number HC10C04611 ('the English Proceedings'), from removing from the Cayman Islands or in any way disposing of or dealing with or diminishing the value of any of his assets which are in the Cayman Islands whether in his own name or not and whether solely or jointly owned up to a value of US$200,000,000 including but not limited to any shareholding in the Second Defendant and/or the Third Defendant."

Save for ancillary orders as to disclosure and cost, that is the only claim made against Mr. Malofeev in these proceedings. The claims against the second and third named defendants ("the Cayman defendants") are for an injunction, until the final determination of the English Proceedings, from dealing with or diminishing the value of any shares they hold in a Russian telecommunications entity, Rostelecom, up to the value of US$200,000,000.

3. On the same day the Plaintiff issued a summons in the Financial Services Division of the Grand Court seeking freezing injunctions against all three Defendants in the terms of the draft order which was attached to the summons, and seeking leave to serve the injunction (but not, in terms, the writ) on Mr. Malofeev out of the jurisdiction.

4. The application came before Justice Cresswell on 19 August 2011. It was heard *ex parte*, although it seems that Mr. Malofeev and the other Defendants were probably aware of it. The judge treated the summons as including an application to serve the writ on Mr. Malofeev outside the jurisdiction. He refused that application. He gave the plaintiff leave to appeal to this Court from that decision. He made no freezing order in relation to Mr. Malofeev; but he did make freezing orders in relation to the two Cayman defendants.

5. The plaintiff filed notice of appeal, dated 2 September 2011. As filed, the notice sought leave to serve the writ on Mr. Malofeev out of the jurisdiction, at an address in Moscow or elsewhere that he might be found; an extension of the injunction granted on 19 August 2011 to include Mr. Malofeev; and leave to effect substituted service of the writ and the injunction as so extended upon him by service on his Cayman Island attorneys or his London solicitors.

6. The judge handed down a written judgment dated 28 September 2011. So far as material in the present context, he identified two questions:

> "Question one: Service. Whether, even if the Grand Court has power to grant a freezing order in aid of foreign proceedings, the Grand Court Rules, Order 11, rule 1(1) (principal cases in which service of a writ out of the jurisdiction is permissible with leave) authorises service of proceedings on a foreign defendant (in the present case First Defendant).
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> Question two: Power. Whether, questions of service apart, the Grand Court has power to grant a free-standing injunction to restrain the disposition of the defendant's assets pending adjudication of the substance of the claim in a foreign court."

7. In relation to the first of those questions, the judge plainly had the provisions of Order 11, rule 1(1) of the Grand Court Rules before him. So far as material, the rule is in these terms:

> "1(1) . . . service of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ - . . .
>
> > (b) an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing) provided that a claim for an interlocutory injunction shall not of itself be a sufficient ground for service of a writ out of the jurisdiction."

8. The judge went on to consider the decision of the Privy Council, on an appeal from Hong Kong in *Mercedes Benz v Leiduck* [1995] UKPC 31 [1996] 1 AC 284. He cited a passage in *Dicey, Morris & Collins The Conflict of Laws* (14th edition, para 8-021) which, as he said, conveniently described the position in England and Wales following the enactment of section 25 of the Civil Jurisdiction and Judgments Act 1982, and the subsequent extension of the reach of that section by the Civil

Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/392). He referred to the decisions of this Court in *Telesystem International Wireless Incorporated & Or v CVC/Opportunity Equity Partners, L.P. & Ors* [2002] CILR 22 (Note) and *Deloitte & Touche v John B. Felderhof & Ors* (CICA 2 of 2010: unreported, 12 July 2011) and to the decision of Justice Quin in *Gillies-Smith v Smith* (unreported, 12 May 2011). He referred also to the observations of Lord Diplock in *Ferdinand Perez de Lasala v Hannelore de Lasala* [1980] AC 546, at 558. At page 23 of his judgment Justice Cresswell said this:

> "The decision of the Privy Council in *Mercedes Benz v Leiduck*, [*supra*] (in relation to identical wording to that found in GCR Order 11, rule 1(1)(b), without the additional words containing the proviso), is authority that, in my opinion, I must follow, having regard to Lord Diplock's observations. In my view, the additional words in the proviso cannot on any view be said to widen the effect of Order 11, rule 1(1)(b) as considered by the Privy Council in *Mercedes Benz v Leiduck*, [*supra*].
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> The Court of Appeal in *Telesystem International Wireless Inc. and TIW Do Brasil Ltd v CVC/Opportunity Equity Partners, L.P. & Ors* [*supra*] said that:
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> > 'The Privy Council [in *Walsh & Ors v Deloitte & Touche Inc*] ... held that as the proceedings for a Mareva injunction [in aid] of a foreign court are interlocutory. . .'
>
> I consider that I am bound to follow the conclusion of the Court of Appeal that proceedings for a Mareva injunction in aid of proceedings before a foreign court are interlocutory. (See further the commentary in Dicey quoted above).
>
> In these circumstances, I must decline to make an order for service out against
> the First Defendant.. . . "

9. At the conclusion of his judgment, the judge - without, as he said, intending in any way to trespass on the role of the legislature - thought it appropriate to suggest that urgent consideration should be given by the Law Reform Commission to whether legislation equivalent to section 25 of the Civil Jurisdiction and Judgments Act 1982 should be introduced into the Cayman Islands. He then set out the issues which called, in his view, for urgent consideration by the Rules Committee. Those issues included what he perceived to be: (a) public policy considerations, referred to in

Telesystem International Wireless (*supra*) as to the status of the Cayman Islands as an advanced and reputable financial sector and as a jurisdiction which can and does deal with international disputes between parties who use Cayman Islands companies in their structure; (b) public policy considerations referred to by Quin J in *Gillies-Smith v Smith* (*supra*); and (c) public policy factors referred to by the Court of Appeal of Jersey in *Solvalub Limited v Match Investments Limited*, to which I shall refer later in this judgment.

10. When the appeal came before this Court on 17 November 2011, Mr. Malofeev was not of course represented; although, representatives of his Cayman Islands attorneys were present at the hearing. The appellant sought and obtained leave to amend its notice of appeal. The only relief now sought on this appeal is a declaration that the Grand Court has power under Order 11, rule 1(1)(b) to permit service of the writ of summons filed in these proceedings out of the jurisdiction.

11. In order to determine that question, it is necessary to refer, in some detail, to the opinions delivered in the Privy Council in *Mercedes Benz v Leiduck* (*supra*). It is convenient to take the facts in that case from the headnote:

> "The first defendant, a German national, and a Monégasque company owned by him agreed to facilitate the sale in the Russian Federation of 10,000 vehicles manufactured by the plaintiff, a German corporation. The plaintiff advanced the company US$20m. to finance the expenses of the operation on terms that it would be repaid with interest if the total price of the vehicles had not been remitted to the plaintiff by an agreed date. As security the company provided a promissory note for US$20m. plus interest, and the first defendant added his personal guarantee by way of aval. The transaction did not proceed, the advance was not repaid and the note was dishonoured. The plaintiff commenced civil proceedings in Monaco against the first defendant in connection with the alleged misappropriation of the funds. On the plaintiff's application the court in Monaco attached the first defendant's assets in Monaco pending judgment but declined to extend the order to cover the first defendant's shares in the second defendant, a company registered in Hong Kong which the plaintiff alleged had received part of the misappropriated money. The plaintiff thereupon applied ex parte to the High Court of Hong Kong for a worldwide Mareva injunction restraining both defendants from dealing with any of their assets, including the first defendant's shares in the second defendant. The deputy judge granted the application on terms that the plaintiff issue a

> writ of summons against both defendants and gave leave for the first defendant to be served in Monaco, where he was in custody pending criminal investigations. The writ claimed against the first defendant moneys due under the aval, moneys had and received, damages for breach of fiduciary duty and an account; and against the second defendant restitution or repayment of moneys paid to it in breach of trust. The latter claim was later discontinued. The writ did not claim any injunctive relief."

The first defendant applied to the High Court in Hong Kong to have the ex parte order discharged. That application succeeded. The High Court quashed the leave to serve out and set aside the freezing order. The Court of Appeal dismissed the plaintiff's appeal.

12. The Plaintiff appealed to the Privy Council. That appeal was dismissed by the Board, by majority (Lord Goff of Chieveley, Lord Mustill, Lord Slynn of Hadley and Lord Hoffman; Lord Nicholls of Birkenhead dissenting). The judgment of the majority was delivered by Lord Mustill. After setting out the procedural history, he said this [1996] A.C. 284, 297:

> "The court has no power to make orders against persons outside its territorial jurisdiction unless authorised by statute; there is no inherent extra-territorial jurisdiction: *Waterhouse v Reid* [1938] 1 K.B. 743, 747, per Greer L.J. Thus, even if Mercedes are right in their contention that, notwithstanding the statements of principle in *Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera S.A.* [1979] A.C.210, a Mareva injunction can properly be granted in support of proceedings in a foreign court, the order cannot simply be made in the air; there must be some means, authorised by statute, of bringing the person affected before the court. For present purposes the only relevant means are those empowered by Ord. 11, r.1(1) read (in the case of proceedings begun by originating summons) together with Ord. 11, r.9. These means are to serve upon the person overseas a document which initiates proceedings and requires the person served to appear and answer them."

13. Lord Mustill went on to point out that, in the case before the Board no originating process had ever been the subject of an application for leave to serve out of the jurisdiction. Indeed, as he said, no document of the kind embraced in Order 11 of the Hong Kong Rules - which was in substantially the same terms as R.S.C. Order11 (which was in force in England and Wales at the relevant time) and Order 11 of the

Grand Court Rules - had ever existed. Nevertheless, the Board went on to address the underlying issues. Lord Mustill said this (*ibid* 297):

> "It is important at the outset to distinguish two questions. The first is concerned with territorial jurisdiction. The foreigner is outside the jurisdiction. The claim against him has no connection with the home territory. No action against him in respect of that claim is brought, or properly could be brought, before the local court. But he has assets within the territory. Assume for this purpose that Mareva proceedings could have been commenced by writ or other originating process, and assume also that such relief could properly be given: i.e., that notwithstanding *The Siskina* [1979] A.C. 210 Mareva relief in support of foreign proceedings is permissible. Does the statutory enlargement of its territorial jurisdiction created by Ord. 11, r.1(1) entitle the court to permit the service of a writ or other originating process 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 is concerned with a different kind of jurisdiction; or, more accurately, a power. Assume for this purpose that the foreign defendant is someone who can be brought before the English court to answer a claim for a Mareva injunction, either because he is present here or because (contrary to the first defendant's contentions on the first issue) Ord. 11, r.1(1)(b) is wide enough to cover all kinds of injunction. Assume also that the matters in dispute have no connection with the English court, and that the plaintiff neither can, nor as in the present case intends to, bring them before that court. Does the court have 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?"

14. Lord Mustill then explained why the majority of the board took the view that the question of territorial jurisdiction - that is to say, the first of the two questions which he had identified - should be considered first. He addressed the scope of Ord.11, rule1(1)(b) in these terms (*ibid*, 299):

> ". . . At its simplest, the argument for Mercedes is that this paragraph expressly posits an injunction ordering the defendant to do or refrain from doing anything within the jurisdiction; that this is exactly what a Mareva injunction does do; and that there is no need to inquire further. In their Lordship's opinion this is not the right approach. It 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] A.C. 144, 153 per Viscount Haldane and *G.A.F. Corporation v. Amchem Products Inc*. [1975] 1 Lloyd's Rep. 601, 605, per Megarry J. and the cases there cited."

After examining the authorities which have been cited in support of the appellants' argument, Lord Mustill went on to say this (*ibid*, 301):

> ". . . it must be asked whether an extra-territorial jurisdiction grounded only on the presence of assets within the territory is one which subparagraph (b) and its predecessors were intended to assert.
>
> Their Lordships are satisfied that it is not. In their opinion the purpose of Ord. 11, r. 1 is 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 Ord. 11, r.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.
>
> Thus, at the centre of the powers conferred by Order 11 is a proposed action or matter which will decide upon and give effect to rights. An application for Mareva relief is not of this character. When ruled upon it decides no rights, and calls into existence no process by which the rights will be decided. The decision will take place in the framework of a distinct procedure, the outcome and course of which will be quite unaffected by whether or not Mareva relief has been granted. Again, if the application 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."

And he concluded (*ibid*, 304) with this passage:

> "For these reasons their Lordships consider that the court would have had no power to order the service of a form of process limited to a claim for Mareva relief even if leave to effect such service had been sought. This conclusion is sufficient to dispose of the appeal. The second question therefore does not arise for decision and their Lordships prefer to express no conclusion upon it. They do however think it proper to make this observation. It 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, be it Hong Kong or England, possessing such jurisdiction, an attempt will be made to obtain Mareva relief in support of a claim pursued in a foreign court. If the considerations fully explored in the dissenting judgment of Lord Nicholls of Birkenhead were then to prevail a situation would exist in which the availability of relief otherwise considered permissible and expedient would depend upon the susceptibility of the defendant to personal service. Their Lordships believe that it would merit the close attention of the rule-making body to consider whether, by an enlargement of R.S.C. Ord. 11, r.1(1), a result could be achieved which for the reasons already stated is not open on the present [state] of the rule."

15. As I have said, Lord Nicholls of Birkenhead dissented. The opening paragraphs of his opinion (*ibid,* 305) set the scene:

> "I regret that I find myself constrained humbly to advise Her Majesty that this
> appeal should be allowed. The first defendant's argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is Monaco, so the Hong Kong court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable.
>
> In order to explain why that is not the law it is necessary to separate clearly the two questions which arise on this appeal. Both are questions of law. The first is whether the Hong Kong court ever has jurisdiction, in the sense of legal power, to grant a Mareva injunction in aid of a judgment being sought in a foreign court. If the Hong Kong court has such jurisdiction, the second question is whether a plaintiff in such a case may serve proceeding claiming a Mareva injunction on a defendant outside the jurisdiction, in the territorial sense, of the Hong Kong court. Failure to distinguish between these two meanings of jurisdiction is a fruitful source of confusion.
>
> The second question cannot be attempted until the first has been given a full answer. The answer given to the first question, and the implications inherent in that answer, provide the basis essential to any consideration of the second question."

16. It can be seen therefore that not only did Lord Nicholls dissent from the view of the majority, he dissented, also, from the order in which the two relevant questions had to be considered. The majority reached their conclusion on what may be called the "territorial jurisdiction question", without considering the second question (which may be called, perhaps, the "Siskina question"). Lord Nicholls took the view that it was necessary to decide the Siskina question before one could go on to deal with the "territorial jurisdiction question". That is what he did, in a lengthy passage of his opinion, (*ibid* 306-7). He examined the proposition - accepted since the decision in *The Siskina* (*supra*) - that there was no power to grant a Mareva injunction in aid of foreign proceedings. He came to the conclusion that that proposition no longer represented the law; and that the law should move on in Hong Kong (and, it seems, in England and Wales) as it had in Australia and recognise that a court did have power to grant a Mareva injunction in aid of foreign proceedings. Subsequent decisions in this Court have established that courts in this jurisdiction will follow Lord Nicholls' lead in relation to the *Siskina* question.

17. Lord Nicholls then turned to the second question: territorial jurisdiction. He needed to do so, of course, because merely deciding that the court would have power to grant a Mareva injunction in aid of foreign proceedings did not answer the question whether such power could be exercised in relation to a defendant who himself had no territorial connection with the jurisdiction of the court and could not, in fact, be served there. Lord Nicholls dealt with that question - for him, the second question - in passages which start at [1996] A.C. 284, 312. He concluded that the court did have power to permit service of the originating process out of the jurisdiction, notwithstanding that the only claim in the proceedings was a claim for Mareva relief in aid of a foreign judgment or foreign proceedings.

18. It was recognised by counsel on behalf of the appellant that it was not possible to distinguish *Mercedes Benz* v *Leiduck* from the present case on the facts; and that the decision of the majority of the Board in that case was plainly against the grant of permission to serve the writ on Mr Malofeev out of this jurisdiction. Notwithstanding the powerful dissenting opinion of Lord Nicholls, it was the

opinion of the majority in the *Mercedes* case that represented the law as it stands under a rule in the terms of GCR Order 11 rule 1(1)(b). His argument, in effect, was that the courts in the Cayman Islands should now take the step of refusing to follow the decision of the Privy Council in *Mercedes Benz v Leiduck* (*supra*). He pointed first to the fact that the position in England and Wales had moved on since that decision. As a matter of history, section 25 of the Civil Jurisdiction and Judgments Act 1982, which was enacted shortly after the decision in *The Siskina* (1979), and had the effect, at that time, of reversing that the effect of that decision in relation to proceedings elsewhere in the European Community. Further, the extension of the reach of section 25 by the 1997 order occurred shortly after the decision in *Mercedes Benz* (1995). So the position in England and Wales, now, is that the courts would not follow that decision. It is said - and the submission has obvious force - that it has been recognised in England and Wales that the position as expounded, first, in *The Siskina* and second in *Mercedes Benz,* is no longer satisfactory in the twenty first century.

19. Second, it is said that courts in other common law jurisdictions have now taken the step which he urges that the courts in the Cayman Islands should now take. He points to the decision Justice Quin in *Gillies-Smith v Smith,* handed down on 10 May 2011. In that case Justice Quin addressed the question, at some length, whether a court in this jurisdiction had power to grant Mareva relief in aid of foreign proceedings. In that context he referred to *Mercedes Benz v Leiduck* (*supra*), and to the judgment of Justice Henderson in *Deloitte and Touche v Felderhof* (unreported, 10 February 2010), He then went on, at paragraph 45 of his judgment, to address the question of territorial jurisdiction. Under the heading "Leave to Serve Out" Justice Quin said this:

> "Ms. Reynolds has applied to this Court for leave to serve the Defendant out of the jurisdiction under GCR O.11 r.1(1)(b). The Plaintiff submits that the Mareva being sought on behalf of the Plaintiff is not interlocutory. The Plaintiff is seeking a final injunction pending the determination of the Canadian proceedings. Again, counsel for the Plaintiff prays in aid the *Mercedes Benz v Leiduck* case where the Hong Kong Court Rules were the same as the Grand Court Rules at the time of that decision, and Lord Nicholls' dicta at page 312 where he states:

> 'All that is required is that in the action an injunction is sought concerning acts or omissions of the Defendant within the territorial jurisdiction of the Court.'"

Justice Quin seems to have overlooked the fact that that passage forms the part of Lord Nicholls' opinion (relation to the question of territorial jurisdiction) in which he dissented from the majority opinion of the Board. The judge did not refer to the majority opinion in *Mercedes* at all. In my judgment, *Gillies Smith v Smith* does not provide a sound basis for departing from the what the Privy Council in *Mercedes* held to be the proper scope of Order 11 rule 11(1)(b).

20. Counsel then referred us to four cases from the Island of Jersey. The first, chronologically, was the decision of the Court of Appeal of Jersey in *Solvalub Limited v Match Investments Limited* [1996] JLR 361. The decision is of obvious importance, in Jersey, in relation to The Siskina question; but it is of little assistance on the territorial jurisdiction question because, on the facts in that case, the court held, in effect, that the defendant had submitted to the jurisdiction. Accordingly, it did not need to address the question which arises in this case. Nevertheless the Jersey Court of Appeal did express its views as to the need for courts in offshore financial centres to have the power which the appellant seeks to invoke in the present case. In giving his judgment, Sir Godfrey Le Quesne, Judge of Appeal, said this (*ibid,* 369):

> "If the Royal Court were to adopt the position that it was not willing to lend its aid to courts of other countries by temporarily freezing the assets of defendants sued in those other countries, that in my judgment would amount to a serious breach of the duty of comity which courts in different junctions owe to each other. Not only so, but the consequence of such an attitude would be that Jersey would quickly become known as a safe haven for persons wishing to evade liabilities imposed on them by the courts to which they are subject. This is exactly the reputation which any financial centre strives to avoid and Jersey so far has avoided with success. These local circumstances, in my judgment, explain why the law on the particular point under consideration should have developed as it appears to have developed in the authorities to which I have referred."

Justice Cresswell drew attention to that passage in his judgment in the present case.

21. The decision of the Court of Appeal of Jersey in the *Solvalub* case was followed by the Royal Court in *Krohn GmbH v Varna Shipyard* [1997] JLR 194. In that case Sir Philip Bailhache, Bailiff, sitting with Jurats, reached the conclusion that the Jersey Court did have power to grant permission to serve process of proceedings which claimed only Mareva relief in aid of foreign proceedings against a defendant who was not within the jurisdiction. *Krohn v Varna* was followed some few months later by the Royal Court in *Yachia v Seila Yahya Levi* (1998/99) 2 O.F.L.R. 88. But the decision in *Yachia v Levi* takes the matter little further: as appears from the judgment of the Deputy Bailiff, Mr. Hamon (*ibid*, 96b-c). He said this:

> "In the light of the very detailed argument that we have heard in court on this matter it might be, had this case preceded Krohn, that this Court might have reached a different conclusion. But the matter is now academic. It is not for the Court to overrule a seasoned judgment of the Royal Court unless it so strongly disagrees with it that in conscience it is quite unable to follow it. That is not the case here."

22. Sir Philip Bailhache, Bailiff returned to the point about a year or so later, on 28 May 1999, *State of Qatar v Al Thani* 1999 JLR 118. Perhaps conscious that the step that had been taken by the Royal Court in *Krohn* had given rise to some controversy, he devoted much of his judgment in the *Al Thani* case to an explanation that, in Jersey the doctrine of precedent should be given much less weight than it would be in England and Wales or in a common law country applying the principles applicable in the courts of England and Wales: see in particular *ibid,* 122 (line 20) through to 126 (line 30). Having satisfied himself that courts in Jersey could treat themselves as free from the fetters of the *Mercedes* case, on the grounds that they were not bound by the principles of precedent which are commonly applied in, for example, this jurisdiction, the Jersey Court followed *Krohn*. In my view, 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.

23. The question was considered in the Isle of Man in *Burgandy Consultants Limited and Trafalgar Nominees Limited*, CP 2003/128. In a judgment delivered by Deemster Doyle on 3 August 2004 reference was made to the dissenting judgment of

Lord Nicholls in *Mercedes*; and to the decision of the Jersey Court of Appeal in *Solvalub*. But the decision in *Burgandy Consultants* is of little assistance on the question of principle whether or not the court has power under its rules to permit service of process outside the jurisdiction.

24. We were referred also to a decision of Bannister J, in the Eastern Caribbean Supreme Court sitting in the Virgin Islands, in *Black Swan Investment I.S.A. and Harvest View Limited and Sablewood Real Estate Limited*, handed down on 23 March 2010. Again, the decision was of little assistance in the present context because it is reasonably clear that the defendants were present within the jurisdiction; so that the territorial jurisdiction question did not arise. The issue in the case was whether or not courts in the British Virgin Islands should continue to take the view that there was no power to grant Mareva injunctions in the aid of foreign proceedings.

25. As I have said, that question whether a Mareva injunction can be granted in aid of foreign proceedings is settled, at least at the level of this Court, by the recent decision of this Court in *Deloitte & Touche v Felderhof*. It is recognised that such an injunction can be granted. But should this Court take the next step of declaring that proceedings can be served on a person who owes no allegiance to this jurisdiction, and is not present in this jurisdiction, simply in order to enable such an injunction to be granted?

26. Given the developments in the law since the *Mercedes* case – including, in particular, the recognition in this jurisdiction that, notwithstanding the decision in *The Siskina*, a Mareva injunction can be granted in aid of foreign proceedings, it is tempting to take that step. But, to my mind, that temptation must be resisted. The step is a step too far for the Court to take. This Court must, in my view, follow the guidance given by the majority in *Mercedes Benz* in the final paragraph of Lord Mustill's opinion. Addressing this very question, he said that, if the position were reached - as it has been now been reached in this jurisdiction - that Mareva relief can be granted in support of a claim pursued in a foreign court, then the question of

whether or not the rules should be extended to enable service out of the jurisdiction on a defendant to such a claim should merit close attention of the rule-making body.

27. For all the reasons which have been explained in other courts, that may well be a desirable step to take; but it is a step which should be taken by the rule-making body, or perhaps the legislature, in this jurisdiction. It is not a step which, in my view, is open to this Court to take. This Court must apply the law as it presently is in the light of the decision of the Privy Council in *Mercedes Benz v Leiduck.*

28. For those reasons, I would dismiss this appeal.

Elliott Mottley Justice of Appeal:

29. I agree.

Sir Anthony Campbell, Justice of Appeal

30. I agree for the reasons given by the President.

Chadwick P

Mottley JA

Campbell JA