

28/9/11

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **FINANCIAL SERVICES DIVISION**

Cause No. FSD 141 of 2011 (PCB)

5 **The Hon Sir Peter Cresswell**  
6 **In Chambers on 15<sup>th</sup>, 16<sup>th</sup> and 18<sup>th</sup> August 2011**



9 **BETWEEN:** **VTB CAPITAL PLC** **Plaintiff**

12 **AND:** (1) **KONSTANTIN MALOFEEV**  
13 (2) **UNIVERSAL TELECOM MANAGEMENT**  
14 (3) **UNIVERSAL TELECOME INVESTMENT**  
15 **STRATEGIES FUND SPC** **Defendants**

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18 **APPEARANCES:** Mr Nigel Meeson QC and Miss Bernadette Carey of Conyers Dill &  
19 **Pearman for the Plaintiff**

23 **JUDGMENT**

26 **By *ex parte* summons dated 11 August 2011, the Plaintiff applies for the following relief:**

- 28 (a) An injunction freezing all assets in the Cayman Islands in the First Defendant's  
29 own name, whether a solely or jointly owned, up to the value of US\$200 million;  
30 and
- 32 (b) An injunction prohibiting the Second Defendant and the Third Defendant, who are  
33 companies incorporated in the Cayman Islands, from dealing with or diminishing  
34 the value of the shares in a Russian company called "Rostelecom" up to a value of  
35 US\$200 million.

37 **The Plaintiff also seeks ancillary orders requiring the Second Defendant and the Third  
38 Defendant to disclose:**

- 40 (a) The details of their beneficial owner or owners;
- 42 (b) The location and value of their shares;
- 44 (c) If the Second Defendant and/or the Third Defendant are not beneficially  
45 owned by the First Defendant, or he no longer holds shares in those entities,  
46 details of:
  - 48 (i) when the new beneficial owners obtained their shareholding in the  
49 Second Defendant and/or the Third Defendant; and

1 (ii) what action has been taken to confirm the details of the new owner or  
2 owners of the shares.  
3

4 The Plaintiff's *Mareva* Application is based on (and intended to support) a Worldwide  
5 Freezing Order granted to the Plaintiff on 5 August 2011 by the High Court of Justice  
6 (Chancery Division) in England in proceedings with Claim Number HC10CO4611 ("the  
7 English Proceedings"). On 5 August 2011, the English High Court:  
8

9 (a) made the Worldwide Freezing Order; and

10  
11 (b) gave the Plaintiff permission to seek to enforce the Worldwide Freezing  
12 Order against the First Defendant's assets in Cyprus, the British Virgin Islands  
13 ("the BVI"), and the Cayman Islands.  
14

15 The application was first made on Monday and Tuesday of this week, but was adjourned until  
16 today because, among other matters, the evidence was incomplete.  
17

18 The materials before the court are set out in schedule 2 to the order which I propose to make.  
19

## 20 21 **The Parties**

22  
23 The Plaintiff is a bank with its registered office in London.  
24

25 The First Defendant is a Russian citizen with controlling interests in what has been described  
26 as "a complex web" of companies located in numerous offshore jurisdictions. The First  
27 Defendant is the founder of the Marshall Capital Group of companies ("Marcap"). Marcap is  
28 a group of companies incorporated in a variety of jurisdictions including Russia, Cyprus, the  
29 BVI, Panama and the Cayman Islands.  
30

31 The Second Defendant is an exempted company incorporated in the Cayman Islands.  
32

33 The Third Defendant is a segregated portfolio company ("SPC") incorporated in the Cayman  
34 Islands.  
35

36 The Plaintiff alleges that the Second Defendant and the Third Defendant are administered by  
37 an entity based in Cyprus. (See paragraph 30 of Mr. Riem's first affidavit.)  
38

39 The Plaintiff alleges that the First Defendant holds a significant shareholding in either or both  
40 of the Second Defendant and the Third Defendant.  
41

## 42 43 **The English Proceedings**

44  
45 The Plaintiff commenced the English Proceedings on 23 December 2010.  
46

47 In the English Proceedings, the Plaintiff claims, among other things, that it was induced by  
48 fraudulent representations to enter into a facility agreement dated 23 November 2007 ("the  
49 Facility Agreement"). The other parties to the Facility Agreement were:  
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(a) a Russian company called Russagroprom LLC ("RAP");

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- (b) Nutritek International Corp (“Nutritek”), a company incorporated in BVI; and
- (c) a BVI registered company called Newblade Limited (“Newblade”), which was a special purpose vehicle which had been incorporated to hold nine Russian dairy plants (“the Dairy Plants”).

At the time the Plaintiff entered into the Facility Agreement, it was known as “VTB Europe PLC”. The Plaintiff changed its name to VTB Capital PLC in January 2009.

Pursuant to the Facility Agreement, the Plaintiff loaned to RAP a total of US\$225,050,000, principally for the purposes of enabling RAP to acquire Nutritek’s shareholding in Newblade.

At the time the Facility Agreement was signed, the Plaintiff says that it believed that it was a genuine commercial transaction between two independent companies for the sale of shares at market value. The Plaintiff says that it has subsequently discovered that:

- (a) Nutritek and RAP were in fact controlled by the same beneficial owners, Marcap, whose ultimate controlling mind was the First Defendant.
- (b) In order to induce the Plaintiff to enter into the Facility Agreement, Nutritek had in fact provided false information regarding the value and revenues of the Dairy Plants held by Newblade.
- (c) The figures provided to the Plaintiff at the time the Facility Agreement was agreed were very significantly overstated.
- (d) The report of Ernst & Young (“E&Y”) provided to the Plaintiff was based on historical figures and forecast trading figures both provided by Nutritek. Based upon those figures, E&Y provided a valuation of US\$366 million. In fact, both the historical figures and the trading forecast were overstated and in addition one of the Dairy Plants was not in fact operating. This is explained further at paragraphs 38 to 57 at the Particulars of Claim.

The Defendants to the English Proceedings are Nutritek, Marshall Capital Holdings Limited (“Marcap BVI”), Marshall Capital LLC (“Marcap Moscow”), and Mr Malofeev. The Plaintiff claims from these defendants damages for deceit, and alternatively damages for conspiracy to defraud.

As far as the Plaintiff is aware, the First Defendant has no assets in the United Kingdom. However, the Plaintiff believes that the First Defendant has or is likely to have substantial assets outside the United Kingdom, including in the Cayman Islands.

As to the progress of the English Proceedings:

- (a) The Plaintiff filed its Claim Form on 23 December 2010;
- (b) On 11 May 2011, the Plaintiff was granted permission to serve the Claim Form out of the jurisdiction. Nutritek and Marcap BVI have been served. The First Defendant and Marcap Moscow have not yet been served. Because of the

1 difficulties regarding service of foreign proceedings in Russia, service could take  
2 between 12 and 18 months.

3  
4 (c) On 5 August 2011, the Plaintiff issued its application for a WFO without notice to  
5 to any of the defendants to the English Proceedings. The WFO was granted by the  
6 English Court together with an order for alternative service on the First Defendant.

7  
8 (d) The Plaintiff is now applying to the courts of the BVI and Cyprus, and to this  
9 Court, for freezing orders.

10  
11 On 8 August 2011, evidence was filed in support of the Application by Nutritek and Marcap  
12 BVI to set aside the permission to serve out granted by Chief Master Winegarten. As part of  
13 the continuing obligation to disclose, the Plaintiff's English Junior Counsel provided a note to  
14 the English Court dated 10 August 2011.

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17 **Cayman Islands Connection**

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19 The First Defendant is a named defendant to the English Proceedings.

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21 The Second Defendant and the Third Defendant are not parties to the English Proceedings.

22  
23 The Plaintiff alleges that the First Defendant has assets in the Cayman Islands, namely his  
24 interests in the second and/or Third Defendant, which are being used to hold shares in  
25 Rostelecom, and that he may be taking steps to dispose of or diminish those shares which  
26 would have the effect of preventing or impairing the Plaintiff's ability to recover the losses it  
27 claims in the English Proceedings. The Rostelecom shares are traded on the London and  
28 Frankfurt stock exchanges, and on some Russian exchanges, including "OTCQS".

29  
30 The evidence in support of the Plaintiff's contentions is set out in the affidavit evidence of  
31 Mr. Riem and Mr. Chernenko, filed in support of the English Proceedings. The evidence  
32 alleges that:

- 33  
34 (a) The First Defendant holds a very substantial shareholding in Rostelecom.  
35  
36 (b) The First Defendant's shareholding in Rostelecom is 7.4 percent of the issued  
37 shares which, with reference to the current market capitalisation, is worth  
38 approximately US\$1.48 billion.  
39  
40 (c) The Plaintiff has received information (see below) that the First Defendant holds  
41 his shareholding in Rostelecom through one or more Cayman Islands corporate  
42 entities (being the Second Defendant and the Third Defendant).  
43  
44 (d) The Plaintiff has been informed by Mr. Chernenko, who has himself been  
45 informed by another confidential source, that the First Defendant is now seeking  
46 secretly to realise or conceal his shareholding in Rostelecom by using the Second  
47 Defendant and the Third Defendant (referred to collectively hereafter as "the  
48 Cayman Entities").  
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50

1 The allegation is that the First Defendant is either liquidating his shares in the Cayman  
2 Entities by selling parcels of his shares on the open market at a value of US\$15 million each,  
3 and/or seeking to obtain a loan secured on the remaining shares held by the Cayman Entities.  
4

5 (e) The Plaintiff also contends that the First Defendant has numerous business  
6 interests which have recently been the subject of considerable scrutiny and  
7 adverse comment in Russia. The level of that scrutiny and adverse comment to  
8 which the First Defendant has been subject has, it is alleged, increased in recent  
9 weeks and the Plaintiff asserts that there is an increasing incentive for the First  
10 Defendant to liquidate his assets and secrete them in jurisdictions around the  
11 world.  
12

13 I refer to the witness statement of Viktor Dmitrievich Savchenko which states:  
14

15 *“For 10 years, I was Head of Legal and Corporate Practice at JSC Svayzinvest, a*  
16 *major Russian telecommunications company. Before then, I had 5 years of*  
17 *experience as a judge and 8 years as an advocate, including 5 years working at*  
18 *Clifford Chance in Moscow.*  
19

20 *I have been asked by the Plaintiff as to whether I am able to assist in providing*  
21 *information concerning the source of the confidential information referred to in the*  
22 *First Affidavit of Mr Chernenko identifying the Cayman Entities as being owned by*  
23 *Mr Malofeev.*  
24

25 *I am able to do so because I was also present at the discussion when this information*  
26 *was provided. The information was provided by senior management of*  
27 *Gazprombank. Whilst I know the identity of the persons who provided that*  
28 *information, it was disclosed in the strictest confidence in breach of the duties they*  
29 *owe Gazprombank and which Gazprombank owe to its client. I therefore wish to keep*  
30 *their details confidential.*  
31

32 *However, I would point to the following as to why the senior management would be*  
33 *aware of this information. It was Gazprombank which purchased the Rostelecom*  
34 *shares for Mr Malofeev or the Marshall Capital Group of Companies. It therefore*  
35 *stands to reason that Gazprombank and its senior management would know about the*  
36 *transfer of those shares to another vehicle and the beneficial owner of that vehicle.”*  
37

38 The Plaintiff offers an undertaking to procure Mr. Savchenko to swear an affidavit in similar  
39 terms to his witness statement.  
40

41 By this application, the Plaintiff seeks a personal order, being the *Mareva* injunction referred  
42 to above, against the owner of the shares, the First Defendant. This is a personal, not a  
43 proprietary, claim.  
44

45  
46 **Justification for ex parte application**  
47

48 The Plaintiff accepts that, if the *Mareva* application is to be made without notice, then the  
49 Plaintiff must address the justification for this, and that this will include making full and  
50 frank disclosure of all matters in its knowledge which are material to this case.

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The grounds on which the application for the WFO was made without notice to the defendants to the English Proceedings are confirmed in Mr Riem's Second Affidavit. The grounds, which are said to be equally applicable in respect of the *Mareva* application before this Court, are in particular as follows:

- (a) While the First Defendant is aware of the Plaintiff's substantive claim in the English Proceedings, he is likely to have come to the conclusion that the Plaintiff has not sought a WFO against him and it will be very many months and probably years before any judgment is obtained against him.
- (b) Until recently, there has not been any great urgency for the First Defendant to dissipate his assets as a result of notification of these proceedings.
- (c) That approach may well change with more immediate actions being taken to dissipate the shareholding, if the First Defendant is notified of the Plaintiff's requests for injunctive relief.
- (d) The Plaintiff is also aware that the First Defendant is under increasing pressure in Russia in the light of growing publicity concerning his apparently dishonest or otherwise unlawful dealings. It has also obtained evidence which suggests that the First Defendant is already attempting to dissipate his shareholding in Rostelecom.
- (e) The Plaintiff is unable to enforce the WFO in Russia. This issue was discussed before Mr Justice Roth in the English Proceedings, at a hearing on 5 August 2011. The transcript of that hearing is at Exhibit BMC-3 to Mr. Carey's Second Affidavit. However, as the Plaintiff seeks a personal, not a proprietary, order, the issue of enforcing in Russia is ultimately irrelevant for the purposes of the Plaintiff's application in this jurisdiction.

The Plaintiff submits that the evidence before this Court confirms that an *ex parte* application is both appropriate and necessary in the particular circumstances of this case.

Roth J in England accepted that service of the WFO could be deferred so that relief could be obtained in BVI and Cayman and all orders served together.

The Plaintiff also acknowledges that it must make full and frank disclosure of all matters in its knowledge which are material (including any matters which might count against the relief being granted), including any likely defences to the Plaintiff's application. To this end, the Riem Affidavit confirms the following:

- (a) The Plaintiff's knowledge of the conduct of the First Defendant is necessarily incomplete, and it is therefore possible that, despite intense preparation work, material documents have inadvertently not been brought to the attention of those making this application.

1 (b) While the Plaintiff has conducted extensive searches of databases derived from  
2 corporate and legal records in the Cayman Islands, there are minimal disclosure  
3 requirements for shareholders and directors and no documentary evidence has  
4 been found of any shareholding held directly by the First Defendant.  
5

6 (c) Aspects of the Plaintiff's evidence are at this stage supported by limited direct  
7 evidence, and in some circumstances come from a confidential source. While the  
8 Plaintiff has now provided further information in relation to the confidential  
9 source, which demonstrates the provenance of the information and evidences its  
10 reliability, the Plaintiff does not have authority to reveal the source's name,  
11 nevertheless in a case of this nature such evidence is about as strong as could  
12 reasonably be expected.  
13

14 The Plaintiff submitted that the balance of convenience lies in favour of the Plaintiff and the  
15 injunctive relief it seeks should be granted.  
16

17  
18 **Plaintiff's submissions as to the legal principles**  
19

20 Mr. Nigel Meeson, QC, in full and well presented submissions, submitted as follows:  
21

22 Up until very recently, it was considered that a free standing injunction was not available in  
23 the Cayman Islands in the circumstances presented by the facts of this case. However,  
24 Cayman Islands jurisprudence has recently changed.  
25

26 In the case of *Bass v Bass* [2001] CILR 317, Sanderson J held that a Plaintiff was not entitled  
27 to a free-standing *Mareva* injunction merely to assist her in proceedings in Texas.  
28

29 However, in the 2010 case of *Deloitte & Touche v Felderhoff* [unreported, Henderson J, 10  
30 February 2010] Henderson J stated that the decision of Sanderson J in *Bass v Bass* [supra]  
31 could no longer be regarded as good law because the Cayman Islands Court of Appeal had, in  
32 *Telesystem International Wireless Inc. and TIW Do Brasil Ltd v CVC/Opportunity Equity*  
33 *Partners, L.P. & Ors.* [2002 CILR Note 22], followed the decision of the English House of  
34 Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 33 that:  
35

36 *"It has been clear that the Grand Court has jurisdiction to issue Mareva injunctions*  
37 *in aid of foreign proceedings even though the parties have no intent to litigate the*  
38 *substance of their dispute in this jurisdiction."*  
39

40 In *Deloitte & Touche v Felderhoff* [supra] the Defendant was resident in the Cayman Islands  
41 and in *Telesystem International Wireless Inc. and TIW Do Brasil Ltd v CVC/Opportunity*  
42 *Equity Partners, L.P. & Ors.* [supra] the Defendant was a Cayman Islands company.  
43

44 Thus (submitted Mr Meeson) it would be a fair summary of Cayman Islands law at that stage  
45 of development that if there was jurisdiction over a defendant, the court would be willing (in  
46 appropriate circumstances) to grant a *Mareva* injunction even though the Plaintiff had no  
47 intention of litigating before the Cayman Islands court, but was using the *Mareva* injunction  
48 as ancillary relief to proceedings in some other forum.  
49

1 However, in order for the Court to exercise this jurisdiction there needed to be either a  
2 defendant who could be served within the jurisdiction or a substantive claim which could be  
3 brought within one of the heads of GCR Order 11, rule 1 so as to permit service of the  
4 proceedings on the Defendant out of the jurisdiction.

5  
6 On 12 May 2011, the final step was (according to Mr Meeson) taken by the Grand Court to  
7 grant relief without the assertion of any other substantive claim in the Cayman Islands. Quin J  
8 issued his judgment in *Catherine Margaret Gillies-Smith v George Bruce Smith (unreported,*  
9 *12 May 2011)* which the Plaintiff sought to enforce in Cayman a WFO granted by a Canadian  
10 Court against a defendant who was not resident in this jurisdiction. Quin J confirmed that,  
11 while an interlocutory injunction is not normally regarded as a cause of action, the situation is  
12 different where the substantive dispute is being tried by a foreign court. A writ may be issued  
13 claiming only interim relief ancillary to a final order being sought from some other court or  
14 arbitral body.

15  
16 The judgment of Quin J was given after an *ex parte* hearing and he did not therefore have the  
17 benefit of full argument on both sides. Mr Meeson pointed out that the decision of Quin J  
18 could be open to the criticism that he followed the dissenting judgment of Lord Nicholls in  
19 *Mercedes Benz v Leiduck, [1996] 1 A.C. 284* rather than following the majority decision.

20  
21 However, the House of Lords decision in *Fourie v Le Roux, [2007] 1 WLR*, (according to Mr  
22 Meeson) confirmed that the English Courts have jurisdiction, in the strict sense, to make an  
23 order in aid of a prospective judgment to be obtained in foreign proceedings, provided that  
24 the person restrained is subject to the in personam jurisdiction of the English Court. Lord  
25 Scott noted:

26  
27 *“My Lords, these authorities show, in my opinion, that, provided the court has in*  
28 *personam jurisdiction over the person against whom an injunction, whether*  
29 *interlocutory or final is sought, the court has jurisdiction, in the strict sense, to grant*  
30 *it. The practice regarding the grant of injunctions, as established by judicial*  
31 *precedent, and rules of court, has not stood still since *The Siskina* [1979] AC 210 was*  
32 *decided and is unrecognisable from the practice to which Cotton LJ was referring in*  
33 *North London Railway Co v Great Northern Railway Co (1883) 11 QBD 30, 39-40*  
34 *and to which Lord Diplock referred in *The Siskina* at p 256. Mareva injunctions*  
35 *could not have been developed and become established if Cotton LJ’s proposition still*  
36 *held good.”*

37  
38 As to Order 11, rule 1(1)(b) Mr Meeson submitted as follows:

39  
40 In addition to determining whether it has the power to grant the injunctive relief sought this  
41 court must also consider whether it has territorial jurisdiction over the First Defendant. To  
42 this end:

- 43  
44 (a) Order 11(1)(b) provides that leave to serve out may be granted if “an injunction  
45 is sought ordering the defendant to do or refrain from doing anything within the  
46 jurisdiction (whether or not damages are also claimed in respect of a failure to do  
47 or the doing of that thing) provided that a claim for an interlocutory injunction  
48 shall not of itself be a sufficient ground for service of a writ out of the  
49 jurisdiction”.

- 1 (b) On appeal in the *Telesystem* case, the Cayman Islands Court of Appeal noted the  
2 Privy Council decision in *Walsh & Ors v Deloitte & Touche Inc.* [2001] UKPC 58  
3 which itself confirms the *Channel Tunnel [supra]* ruling that proceedings for  
4 *Mareva* injunctions in support of foreign proceedings are interlocutory in nature.  
5 On this reasoning, the court might consider itself barred from granting leave to  
6 serve out in this case.  
7
- 8 (c) However, the comment made in respect of such an injunction being  
9 “interlocutory” was obiter, and was not made in the context of consideration of the  
10 meaning of Order 11, rule 1(1)(b).  
11
- 12 (d) Each of these cases can be distinguished from the facts in this case in that they  
13 each involved a fact scenario in which the Plaintiff had also issued substantive  
14 proceedings in the domestic court and applied to stay those proceedings. That is a  
15 wholly different case from the situation (as here) where there are no substantive  
16 proceedings on the merits before the Cayman Islands courts, the only claim being  
17 for an injunction.  
18
- 19 (e) Quin J determined that injunctive relief granted in aid of foreign proceedings and  
20 in circumstances in which no cause of action is pursued against the defendant in  
21 Cayman, can in fact be considered a “final” injunction justifying the grant of leave  
22 to serve out. This reflects the approach of Lord Nicholls in *Mercedes Benz*, who  
23 confirmed that a claim for an injunction which can stand on its own feet as the  
24 entirety of the relief claimed ought, in principle, to be within sub-paragraph (b).  
25
- 26 (f) The approach of Quin J is the correct approach and it is applicable in this case.  
27 The Plaintiff has not issued substantive proceeding against the Cayman Entities.  
28 Rather, the only relief it seeks in this jurisdiction is the injunction in support of the  
29 English Proceedings. The injunction sought in this case is final, and the proviso in  
30 Order 11(1)(1)(b) does not bite. Leave should therefore be granted to serve the  
31 First Defendant out of the jurisdiction.  
32

33 For completeness, the Plaintiff noted that this issue cannot arise in England, following the  
34 enactment of section 25 of English Civil Jurisdiction and Judgments Act 1982. In any event,  
35 Lord Scott in *Fourie v Le Roux [supra]* considered that his reasoning in paragraphs 29 and 20  
36 of his judgment applied even without the statutory overlay of section 25.  
37

38 Mr Meeson referred to the approach in Jersey, BVI and the Isle of Man and submitted as  
39 follows:  
40

41 In addition, Quin J appears to have relied upon a submission that the courts in Jersey, BVI  
42 and Isle of Man, have accepted and adopted Lord Nicholls’ reasons.  
43

44 There is judicial precedent to support the decision of Quin J in the Isle of Man case of *Re:*  
45 *Securities and Investments Board [1996-98] MLR N13* and also in the following Jersey cases:  
46

47 In *Krohn GMBH v. Varna Shipyard, [1997] JLR 194* the Royal Court of Jersey confirmed  
48 that it had the power to order service on a defendant outside Jersey when only a *Mareva*  
49 injunction was sought within the jurisdiction. In doing so, the Court said that there were  
50 “sound reasons of judicial policy” for reaching the same conclusion as Lord Nicholls in

1 *Mercedes Benz v Leiduck*, [supra]. The Court added that the Jersey law provisions regarding  
2 the granting of leave to serve out of jurisdiction should be given “their natural meaning” and  
3 merely required that an injunction be sought concerning acts or omissions of the defendant  
4 within the territorial jurisdiction of the court. In doing so, the court noted that it was:

5  
6 “...entitled to prevent defendants from using Jersey as a safe haven by  
7 transferring money here out of the reach of justice at a preliminary stage  
8 of proceedings against them abroad. This was in the interests both of  
9 judicial comity and Jersey’s position as an important financial centre.”

10  
11 Elsewhere in the judgment the Royal Court quoted the decision of the Court of Appeal in  
12 *Solvalub Limited v Match Investments Ltd*, [1996] JLR 61, in which the Court of Appeal  
13 made the following comments, which the Plaintiff submitted are of equal relevance in this  
14 case:

15  
16 “If the Royal Court were to adopt the position that it was not willing to lend its aid  
17 to courts of other countries by temporarily freezing the assets of defendants sued in  
18 those other countries, that in my judgment would amount to a serious breach of the  
19 duty of comity which courts in different jurisdictions owe to each other. Not only so,  
20 but the consequences of such an attitude would be that Jersey would quickly become  
21 known as a safe haven for persons wishing to evade liabilities imposed on them by the  
22 courts to which they are subject. This is exactly the reputation which any financial  
23 centres strive to avoid and Jersey so far has avoided with success.”

24  
25 In *Yachia v Levy* [1998] 2 OFLR 88 the Royal Court of Jersey followed the decisions in  
26 *Solvalub Limited v Match Investments Ltd* and in *Krohn GMBH v. Varna Shipyard*, [supra]  
27 in similar circumstances. In *State of Qatar v Sheik Khalifa bin Hamad Al Thani*, [1999] JLR  
28 118 the Royal Court was asked to consider an appeal against an *ex parte* injunction which  
29 had been granted in aid of proceedings brought in another jurisdiction and against orders  
30 granting leave to serve the order for the injunction out of the jurisdiction. In doing so, the  
31 Royal Court confirmed that “the rigid doctrine of precedent in English law” did not apply in  
32 Jersey in the light of the fact that the source of Jersey law is Norman law and it was open to  
33 the Royal Court to decline to follow a decision of the Privy Council which had been  
34 invalidated by subsequent legislation or a compelling change of circumstances. Rather, the  
35 persuasiveness of such decisions would “depend upon the similarity of the law in the  
36 jurisdiction in question and social and policy considerations in Jersey”.

37  
38 Mr Meeson submitted that given that the question being considered was not a matter arising  
39 out of Jersey common law or customary law, but was the construction of a provision in  
40 identical terms to an English provision, this reasoning is illogical. The true position is that  
41 the Jersey Court was entitled to decline to follow the reasoning of the majority in *Mercedes*  
42 *Benz* [supra] (which is only of persuasive value being a decision from Hong Kong) because  
43 of the local circumstances and overriding public policy considerations. This is a well-  
44 recognised principle which is equally applicable to the Cayman Islands.

45  
46 The public policy of the Cayman Islands clearly requires it to operate so as to assist foreign  
47 courts and to prevent the jurisdiction becoming a safe haven for wrongdoers. Quin J does not

1 refer to these cases and they were probably not cited to him, but they do support his approach  
2 – it is exactly the approach adopted by the Royal Court of Jersey.

3  
4 The Plaintiff's primary submission is that the court should follow its previous decision to (a)  
5 grant free-standing *Mareva* relief and (b) grant leave to serve out of the jurisdiction in these  
6 circumstances, and another *ex parte* application is not the appropriate forum to review the  
7 reasoning of Quin J. There are very sound policy reasons why the courts in the Cayman  
8 Islands should have the power to grant a free standing injunction against defendants who use  
9 the financial services industry of these Islands, so as to prevent the abuse of our financial  
10 services industry for improper activities. These policy considerations justify a departure in  
11 the common law jurisprudence of the Cayman Islands from that of the UK.

12  
13 Lord Nicholls' reasoning is described by the editors of Dicey as "powerful" [8-023] and it is  
14 quite appropriate for the Grand Court to follow the lead of the Royal Court of Jersey and  
15 adopt both limbs of his reasoning so as to allow free-standing relief and service out of the  
16 jurisdiction.

17  
18 As to the Chabra jurisdiction Mr Meeson submitted as follows:

19  
20 Regardless of whether or not the court considers it has territorial jurisdiction to grant the  
21 Plaintiff leave to serve the First Defendant out of the jurisdiction pursuant to Order 11, rule  
22 (1)(b), the court has personal jurisdiction over the Cayman Entities and has the power to grant  
23 freezing relief in respect of the Cayman Entities despite the fact that they are "non-cause-of-  
24 action defendants". The fact that the First Defendant may be considered to be out of the  
25 territorial jurisdiction of this court is therefore entirely irrelevant to the question of whether  
26 or not the Plaintiff is entitled to injunctive relief as against the Cayman Entities.

27  
28 Following the judgment of Henderson J in *Ahmad Hamad Algosaibi and Brothers Company v*  
29 *Saad Investments Company Limited et al*, [unreported, 17 November 2009] it is now  
30 accepted that the Grand Court has jurisdiction to grant a *Mareva* injunction against a  
31 corporate defendant against which no cause of action is asserted where there is "*a good*  
32 *arguable case that assets apparently vested in that defendant are in fact owed beneficially by*  
33 *another defendant against whom a cause of action is sought*".

34  
35 This so-called "*Chabra* jurisdiction" derives from the judgment in *TSB Private Bank*  
36 *International SA v Chabra and another* [1992] 1 WLR 231 (Ch.)

37  
38 In *TSB Private Bank International SA v Chabra and another*, [supra], the Court found that a  
39 company owned and controlled by Mr Chabra was "nothing more than a convenient  
40 repository" for Mr Chabra's assets, and that the injunction against the company was  
41 "ancillary and incidental to" the claim against Mr Chabra and therefore within the power of  
42 the court to grant.

43  
44 The *TSB Private Bank International SA v Chabra and another*, [supra], case was approved in  
45 the English case of *Dadourian Group International Inc and Others v Azuri Limited et al*  
46 [2005] EWHC 1768 (CH).

47  
48 The *Chabra* jurisdiction has been recognised and applied in the Cayman Islands: see *Walker*  
49 *International Holdings Limited and Others v Olerius Ltd and Others* [2003] CILR 457  
50 (*Smellie C.J*) and most recently in the *Saad* case.

1  
2 On appeal in December 2009, the Court of Appeal adopted with approval the comments of  
3 Henderson J at first instance and noted:

4  
5 *“...there is jurisdiction to grant a Mareva injunction against a NCAD [non-*  
6 *cause- of-action defendant] in a case where such an injunction would be ancillary*  
7 *and incidental to the effective enforcement of a prospective judgment against*  
8 *whom there is a pleaded cause of action (a “cause-of-action defendant” or*  
9 *“CAD”) because the assets of the NCAD – that is to say, assets to which the*  
10 *NCAD is itself entitled beneficially (as well as assets in which the CAD has a*  
11 *beneficial interest) – may become available to satisfy a judgment against the*  
12 *cause-of-action defendant.”*

13  
14 In July 2011, the Court of Appeal released its judgment in respect of the appeal in *Deloitte &*  
15 *Touche v Felderhoff & 2 Ors. [12 July 2011] CICA 2 of 2010*. In that case the facts were  
16 slightly different to the facts presently before this Court, as the principal defendant was  
17 resident in the Cayman Islands, and proceedings could be (but were not) pursued against him  
18 in Cayman. However, no cause of action was asserted against the Second Defendant or the  
19 Third Defendant and there was no intention on the part of the Plaintiff to advance the  
20 proceedings in Cayman for any purpose other than as might be necessary for enforcement or  
21 collection purposes. While the case is of limited assistance in this instance, the Court of  
22 Appeal confirmed the following:

23  
24 *The purpose of the Chabra jurisdiction is to ensure that enforcement of a future*  
25 *judgment of the court against a cause-of-action defendant is not frustrated by the*  
26 *dissipation of assets (in the hands of the non-cause of action defendant) which would*  
27 *or might otherwise be or become available to satisfy the judgment.”*

28  
29 Mr Meeson pointed out that the Cayman cases dealing with the *Chabra* jurisdiction do not  
30 involve fact scenarios in which, as in the present case, both of the following two factors arise:

- 31  
32 (a) the defendants before the court are *Chabra* defendants; and  
33  
34 (b) the Plaintiff has not commenced substantive proceedings against the *Chabra*  
35 defendants.

36  
37 However, these facts did arise in the BVI case of *Black Swan Investment I.S.A v Harvest*  
38 *View Limited and Sablewood Real Estate Limited [Unreported, 23 March 2010, Bannister JJ]*.  
39 In that case, the principal defendant in the main proceedings (which were pursued in South  
40 Africa) was a Mr Rautenbach. The two defendants to the BVI proceedings were both BVI  
41 companies, against which the plaintiff had no direct cause of action and no substantive  
42 proceedings had been commenced against the BVI companies in BVI. In fact, the only basis  
43 on which relief was claimed against the two defendants in the BVI was that they were  
44 extensions of Mr Rautenbach.

45  
46 Unfortunately, at least for the purposes of conducting an analysis in the case before this court,  
47 the BVI Eastern Caribbean Supreme Court did not analyse the difference between this type of  
48 case and the “standard” *TSB Private Bank International SA v Chabra and another, [supra]*,  
49 case in which proceedings are pursued in the jurisdiction. However, following on from the  
50 decision in *Black Swan Investment I.S.A v Harvest View Limited and Sablewood Real Estate*

1 *Limited [supra]*, the BVI Eastern Caribbean Supreme Court has delivered a further helpful  
2 judgment in the case of *Yukos CIS Investment Ltd and Winacanto Holdings BV v Yukos*  
3 *Hydrocarbons Investments Limited et al Claim No BVIHC (COM) 85 of 2010 [2010: 28 July,*  
4 *6 August]*. The Applicant sought, among other things, orders that the Respondents' assets be  
5 frozen and that certain of the Respondents give detailed disclosure of their financial position.  
6 In the course of giving judgment, Bannister J noted the following:

7  
8 *[16] In effect, that leaves the 'free standing' Black Swan jurisdiction as the only*  
9 *basis for the grant of any of the relief sought by the claimants. Black Swan*  
10 *[supra] was a pure freezing order case based upon the fact that the claimant*  
11 *was pursuing in South Africa a money claim against the owner of two*  
12 *companies incorporated in the BVI. The order made by the Court of Appeal*  
13 *and continued by myself froze the assets of the two BVI companies in support*  
14 *any money judgment which the claimant might obtain in South Africa. Black*  
15 *Swan [supra] rests upon the willingness of the court, in a case where the*  
16 *defendant to foreign proceedings has assets within its jurisdiction, to act in*  
17 *aid of the claimant's prospective entitlement to a money judgment if successful*  
18 *in the foreign proceedings. It depends upon the assumption that the foreign*  
19 *money judgment will be enforceable, by registration or otherwise, in the court*  
20 *within whose jurisdiction the assets are situated. It is this last feature which*  
21 *founds the jurisdiction [see per Lord Nicholls in Mercedes Benz v Leiduck,*  
22 *[supra]].*

23  
24 In reliance on the *Chabra* jurisdiction as now developed by the BVI Eastern Caribbean  
25 Supreme Court, Mr Meeson submitted that the Grand Court has jurisdiction to grant Mareva  
26 relief to the Plaintiff in the present case on the basis that the assets vested in the Cayman  
27 Entities may in fact be owned beneficially by the First Defendant, against which a cause of  
28 action is asserted. Further, any money judgment which the First Defendant may obtain in  
29 England could be enforced in the Cayman Islands in reliance on Order 11, rule 1(1)(m) which  
30 enables the Court to grant leave to serve out in order to enforce a judgment or award.

31  
32 For the public policy reasons, this is a necessary jurisdiction to assert as recognised by  
33 Bannister J and his approach should be followed in the Cayman Islands. The court has  
34 undoubted personal jurisdiction over the second and third defendants and should, in support  
35 of the English action against the First Defendant, grant the relief sought irrespective of  
36 whether the court decides to assert jurisdiction over the First Defendant himself. To do  
37 otherwise would be a dereliction of the duty of the court to ensure that justice is not  
38 frustrated and that any future judgment of the English court against the First Defendant can  
39 be enforced against his assets in the Cayman Islands.

40  
41  
42 **Good arguable case**

43  
44 Mr. Meeson submitted as follows:

45  
46 The next consideration for this court is whether or not the Plaintiff has a good arguable case  
47 against each of the Defendants. To this end:

- 1 (a) The basis of the claims advanced by the Plaintiff against the Defendant in the  
2 English Proceedings are set out in the Particulars of Claim, and show a good  
3 arguable case in that jurisdiction.  
4
- 5 (b) In granting the WFO, the English Court has already accepted that the Plaintiff has  
6 an arguable case against the First Defendant. The Plaintiff respectfully submits  
7 that this court should be persuaded by the views of the English Court in this  
8 regard, for the reasons referred to in the Judgment.  
9
- 10 (c) The case against the Second Defendant and the Third Defendant is also strongly  
11 arguable.  
12  
13

14 **Real risk of dissipation**  
15

16 Mr. Meeson submitted as follows:  
17

18 The Plaintiff must also show that there is a real “objective” risk that the defendant will  
19 remove assets from the Cayman Islands, dispose of them, dissipate them, or hide them.  
20

21 Cayman Islands case Law confirms that the burden on the plaintiff is to show a real risk of  
22 the above is not a slight one, and the evidence may take a number of different forms, such as  
23 direct evidence that the defendant has previously acted in a way which shows that his probity  
24 is not to be relied on or evidences that inquiries about the characteristics of the defendant  
25 have led to a “blank wall”. Precisely what form of evidence is required will depend on the  
26 particular circumstances of the case.  
27

28 The Grand Court has noted that the offshore nature of the Cayman Islands may give rise to  
29 the need to apply different considerations to the issue of dissipation of assets than those  
30 expounded by the English Courts. In *Kilderkin Investments Ltd v Player*, [1980-83] CILR  
31 403 the Court noted:  
32

33 *“Where considerable sums of money are involved and the persons concerned have no*  
34 *strong ties to the Islands, or a company is involved which can easily fold or be*  
35 *stripped of its assets, the temptation to remove the assets from the jurisdiction to*  
36 *escape the effects of a judgment of this court must be great. That temptation gives*  
37 *rise to a risk. Risk may be inferred from circumstances here which might not give*  
38 *rise to the same inference in England. This is particularly so where a person is using*  
39 *this jurisdiction to conceal or harbour the proceeds of fraud or other*  
40 *misfeasance.”*  
41

42 In this case, there is evidence of the risk of dissipation by the First Defendant:  
43

- 44 (a) The stating point is that there is a good arguable case that the Plaintiff has been  
45 the victim of a sophisticated fraud involving deceit;  
46
- 47 (b) The First Defendant, with others, carried out the deceit through a complex web of  
48 companies in various jurisdictions which enabled the Defendants to conceal from  
49 the Plaintiff the fact that RAP and Nutritek were under common control.  
50

1 (c) The First Defendant and others are adept at providing misleading accounts and  
2 financial information utilising a web of companies and concealing the connections  
3 between them. See Mr Riem's analysis of the E&Y Report contained in his First  
4 Affidavit in the English Proceedings.

5  
6 (d) Aside from his interest in Marcap and his possible interest in the Rostelecom  
7 shares, little is known about the First Defendant's assets, despite the making of  
8 inquiries by the Plaintiff and its inquiry agents. The fact that so little information  
9 has been obtained is itself an indication of the risk of dissipation of assets.

10  
11 (e) There is evidence that the First Defendant is engaging in ongoing attempts to raise  
12 funds in the region of \$1.6 billion from charging of the Rostelecom shares or to  
13 sell the shares. These shares are the largest asset in which the First Defendant has  
14 a direct or indirect interests and he is making very concerted attempts to liquidate  
15 this asset.

16  
17 (f) The growing pressure on the First Defendant in Russia (which the Plaintiff  
18 anticipates will grow further in the short term) provides a powerful incentive for  
19 him to liquidate assets and secrete them in jurisdictions around the world.

20  
21 The Plaintiff therefore submitted that:

22  
23 (a) On the evidence before this court, there is a real risk of dissipation of the  
24 Defendant's assets; and

25  
26 (b) If the injunction is not granted, it would cause significant prejudice to the Plaintiff  
27 and thereby injustice in that it would likely have no recourse to the First  
28 Defendant's assets in order to satisfy a judgment debt which it anticipates will be  
29 in the vicinity of US\$185,000,000.

30  
31  
32 **Balance of Convenience**

33  
34 Mr. Meeson submitted as follows:

35  
36 The Plaintiff's case is that the Plaintiff is entitled to an extremely significant award of  
37 damages in the English proceedings on the basis of fraudulent actions by the First Defendant.  
38 There is evidence that the First Defendant may have assets in the Cayman Islands, which he  
39 is able to move internationally. He has interests in more than one jurisdiction and it cannot  
40 be right that he cannot be touched and wholly avoid the jurisdiction of the English Court.

41  
42 The English court has already granted worldwide Mareva relief and so any prejudice to the  
43 First Defendant has already occurred. There will be no additional prejudice to him as a result  
44 of the Cayman order.

45  
46 In relation to the Chabra defendants there are two possibilities: They are correctly being  
47 targeted as being vehicles of the First Defendant in which case there is no prejudice. If they  
48 have nothing to do with him and/or do not hold Rostelecom shares, then the injunction would  
49 not bite on them – at most they may seek to apply to the court to discharge the orders for the  
50 sake of completeness.

1  
2 In summary Mr Meeson submitted as follows:

- 3  
4 (a) The Plaintiff has a justiciable cause of action against the First Defendant in the  
5 Cayman Islands, namely to give effect to the injunction in this jurisdiction until  
6 the final determination of the English Proceedings;  
7  
8 (b) In reliance on the Chabra jurisdiction the Plaintiff is also entitled to obtain  
9 injunctive relief in respect of the Cayman Entities (D2 and D3).  
10  
11 (c) The Plaintiff has demonstrated a good arguable case before the English High  
12 Court;  
13  
14 (d) The Plaintiff has also demonstrated a significant claim to the funds which it  
15 believes are held in the Cayman Companies and, accordingly, this court should  
16 assist the English High Court to preserve those funds pending final judgment in  
17 the English Proceedings;  
18  
19 (e) The interim relief is needed to render more efficacious the English Proceedings;  
20  
21 (f) On the evidence before this court, there is a real risk of dissipation of significant  
22 assets and, if the injunction sought by the Plaintiff is not granted, it would cause  
23 significant prejudice to the Plaintiff and thereby injustice;  
24  
25 (g) In the light of the above, the balance of convenience plainly favours the granting  
26 of relief on the Plaintiff's *ex parte* application.  
27  
28

29 **Leave to serve out of the jurisdiction**

30  
31 As to leave to serve out, Mr Meeson submitted as follows:

32  
33 The Plaintiff also applies to this Court for leave to serve the First Defendant out of the  
34 jurisdiction under Order 11, rule 1(1) of the Grand Court Rules ("the GCR").  
35

36 Pursuant to Order 11, the Applicant must:

- 37  
38 (a) Show that the case falls clearly within one or other of the sub-paragraphs in Order  
39 11, rule 1(1);  
40  
41 (b) Prove that it has a good arguable case, and that there is a serious issue to be tried  
42 with reference to the causes of action expressly mentioned in the Originating  
43 Summons; and  
44  
45 (c) Satisfy the court that it is proper to exercise its discretion to grant leave.  
46

47 GCR Order 11, rule 1 specifies the principal cases in which service of a writ out of  
48 jurisdiction is permissible. The Plaintiff's case falls within Order 11, rule 1(1)(b), which  
49 provides as follows:  
50

1           *"an injunction is sought ordering the defendant to do or refrain from doing anything*  
2           *within the jurisdiction (whether or not damages are also claimed in respect of a*  
3           *failure to do or the doing of that thing) provided that a claim for an interlocutory*  
4           *injunction shall not of itself be a sufficient ground for service of a writ out of the*  
5           *jurisdiction."*

6  
7           *Good arguable case*

8  
9           The Plaintiff submitted that the Plaintiff has a good arguable case for pursuing the  
10          proceedings and involving the Defendants.

11  
12          *Exercise of Discretion*

13  
14          In the light of each of the matters referred to above, and in the light of the orders as to service  
15          out of the jurisdiction issued by the High Court in the English Proceedings, the Plaintiff  
16          submitted that it is proper for the Court to exercise its discretion to grant leave to serve out of  
17          jurisdiction.

18  
19          *Substituted Service*

20  
21          The Plaintiff also applies to this Court for orders as to substituted service on the First  
22          Defendant pursuant to GCR Order 64, rule 4. The application is made relying on evidence  
23          provided to the English Court.

24  
25  
26          **Analysis and Conclusions**

27  
28          I turn to consider Mr. Meeson's submissions.

29  
30          It is important to distinguish between two questions.

31  
32          Question one: Service. Whether, even if the Grand Court has power to grant a freezing order  
33          in aid of foreign proceedings, the Grand Court Rules Order 11, rule 1(1) (principal cases in  
34          which service of a writ out of the jurisdiction is permissible with leave) authorises service of  
35          proceedings on a foreign defendant (in the present case the First Defendant).

36  
37          Question two: Power. Whether, questions of service apart, the Grand Court has power to  
38          grant a free-standing injunction to restrain the disposition of the defendant's assets pending  
39          adjudication of the substance of the claim in a foreign court.

40  
41  
42          **The First Defendant**

43  
44          In *Mercedes Benz v Leiduck*, [supra] the Privy Council was concerned with Hong Kong RSC  
45          Order 11, rule 1 (1) (b), which was in identical terms to GCR Order 11, rule 1(1)(b) up to but  
46          not including the GCR proviso - "an injunction is sought ordering the defendant to do or  
47          refrain from doing anything within the jurisdiction (whether or not damages are also claimed  
48          in respect of a failure to do or the doing of that thing)". GCR Order 11, rule 1 (1) (b)  
49          continues "provided that a claim for an interlocutory injunction shall not of itself be a  
50          sufficient ground for service of a writ out of the jurisdiction".

1  
2 Mr. Meeson accepted, for the purposes of this application (while reserving the position if this  
3 matter goes further), that I should follow the decision of Smellie J, as he then was, in *Wheeler*  
4 *v Wheeler* 1997 CILR 362 at 375:

5  
6 *"... as the rationes decidendi of a number of cases, this court has expressed the*  
7 *view that s.11 of the Grand Court Law does not have the effect of importing the*  
8 *substantive provisions of English statutes."*  
9

10 In England and Wales, section 25 of the Civil Jurisdiction and Judgments Act 1982 confers a  
11 jurisdiction on the court to grant interim relief in English proceedings brought solely for that  
12 purpose, the interim relief being granted in support of foreign proceedings either commenced  
13 or to be commenced. *Mareva* relief can be granted in those English proceedings for the  
14 purpose of preserving assets, so that assets will be available to satisfy a judgment obtained in  
15 the foreign proceedings, which will be enforceable in England. There is a similar jurisdiction  
16 under section 44 of the Arbitration Act 1996 for relief to be granted in support of arbitral  
17 proceedings, including arbitral proceedings abroad. Both section 25 proceedings and section  
18 44 proceedings are the subject of rules enabling service of the proceedings to be made with  
19 permission outside of the jurisdiction of the courts of England and Wales.

20  
21 There is no equivalent of section 25 of the Civil Jurisdiction and Judgments Act 1982 or of  
22 section 44 of the Arbitration Act 1996 in the Cayman Islands legislation.

23  
24 The position in England and Wales until section 25(1) of the Civil Jurisdiction and Judgments  
25 Act 1982 came fully into force in 1997 is conveniently described in Dicey, Morris & Collins  
26 The Conflict of Laws 14th edition, volume 1, at paragraph 8-021 and following:

27  
28 *"Relationship between jurisdiction to determine the merits and jurisdiction to order*  
29 *interim protection. Where the English court has jurisdiction over the substance of a*  
30 *case, it also plainly has jurisdiction to grant interim measures to preserve the position*  
31 *pending adjudication of the merits. If proceedings are pending, or are contemplated,*  
32 *in a foreign country, the claimant may wish to preserve its position by seeking interim*  
33 *relief in England. For example, it may be only in England that there are assets*  
34 *available to satisfy a judgment granted in the foreign country to whose jurisdiction*  
35 *the defendant is amenable, and the claimant may be advised to seek a freezing*  
36 *injunction to prevent the defendant from making itself judgment-proof.*

37  
38 *Until s.25(1) of the Civil Jurisdiction and Judgments Act 1982 came fully into force in*  
39 *1997, there was a serious gap in English law. In The Siskina plaintiff cargo-owners*  
40 *had a claim against a one-ship Panamanian company for damages for wrongful*  
41 *detention of their cargo in Cyprus. After discharge of the cargo the defendants' only*  
42 *asset, their ship, sank and their underwriters in London were due to pay the insurance*  
43 *proceeds there. The bills of lading provided that the courts of Genoa, Italy, would*  
44 *have exclusive jurisdiction over cargo claims. The plaintiffs sought to assert*  
45 *jurisdiction in England on the basis that their claim for a Mareva injunction was an*  
46 *injunction "sought ordering the defendant to do or refrain from doing anything within*  
47 *the jurisdiction" (i.e. not to remove or dispose of the insurance proceeds pending the*  
48 *outcome of the Genoese proceedings) within the meaning of what is now CPR,*  
49 *r.6.20(2), Rule 27, clause (2). The House of Lords held that the English court had no*  
50 *jurisdiction to grant such an injunction against foreign defendants otherwise than in*

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*support of a cause of action in respect of which the defendant was amenable to the jurisdiction.*

*In Mercedes Benz v Leiduck, [supra]the Privy Council held that the Hong Kong court had no power under RSC Order 11, r.1(1)(i.e. CPR, r.6.20) to restrain a foreign defendant from disposing of shares in a Hong Kong company pending a civil fraud action against him in Monaco. In that case the Privy Council drew a distinction between two questions. The first was one of jurisdiction: whether, even if the court had power to grant Mareva relief in aid of foreign proceedings, RSC Order 11, r.1(1) authorised service of proceedings on a foreign defendant. The second issue was whether, questions of service apart, the court had power to grant a free-standing injunction to restrain the disposition of the defendants' assets pending adjudication of the substance of the claim in a foreign court. The Privy Council held, by a majority, that the purpose of RSC Order 11 was to give jurisdiction to the court to adjudicate on a claim advanced in an action or matter, and an application for a Mareva injunction alone was not an action or matter which would decide and give effect to rights. There was therefore no mechanism to allow service out of the jurisdiction on the defendant. Accordingly, it was not necessary to decide the second question. But Lord Nicholls of Birkenhead delivered a powerful dissenting opinion: He thought that The Siskina, to the extent that it held that the right to obtain an interlocutory injunction was dependant on there being an existing cause of action justiciable in England, was no longer good law.*

*The effect of these decisions is reversed by s.25 of the Civil Jurisdiction and Judgments Act 1982 and CPR, r.6.20(4). Section 25(1) was enacted in order to give effect to Art.24 of the 1968 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, but it has since 1987 applied to proceedings commenced or to be commenced in a State which is party to the 1968 Convention (and the parallel Lugano Convention). Since 1997 it has applied to proceedings in countries which were party to neither Convention, and it has been amended to apply to proceedings commenced or to be commenced in States to which the Judgments Regulations applies." ... ..*

*"Section 25 of the 1982 Act. Section 25(1), as amended, provides that the English court has power to grant interim relief where (a) proceedings have been or are to be commenced in a 1968 Convention State or Lugano Convention State or in a Regulation State (or in another part of the United Kingdom) and (b) the subject matter of the proceedings is within the scope of the Regulation (whether or not the Regulation has effect in relation to the proceedings). Provision was made in s.25(3) for the power to be extended by Order in Council so as to be exercisable in relation to proceedings commenced or to be commenced otherwise than in a 1968 or Lugano Convention Contracting State, and to proceedings whose subject matter was not within the scope of the Conventions. The power was so extended in 1997. CPR, r.6.20(4) provides that permission to serve a claim form out of the jurisdiction may be given where a claim is made for an interim remedy under s.25(1) of the 1982 Act." .....*

As is pointed out in paragraph 8-028 and following, on an application for interim relief under section 25, the court may refuse to grant the relief if, in the opinion of the court, the fact that the court has no independent jurisdiction in relation to the subject matter of the proceedings

1 makes it inexpedient for the court to grant it. (See further paragraphs 8-028 to paragraph 8-  
2 031.)

3  
4 At paragraph 8-032 to paragraph 8-035 interim relief where proceedings are stayed is  
5 considered.

6  
7 Where a defendant is served within the Cayman Islands with proceedings claiming  
8 substantive relief, there is jurisdiction to grant a freezing order in aid of foreign proceedings  
9 when the proceedings (for substantive relief in the Grand Court) against the defendant  
10 (served in the Cayman Islands) are stayed. (See the decision of the Court of Appeal in  
11 *Telesystem International Wireless Inc. and TIW Do Brasil Ltd v CVC/Opportunity Equity*  
12 *Partners, L.P. & Ors. [supra]*.)

13  
14 In *Telesystem International Wireless Inc. and TIW Do Brasil Ltd v CVC/Opportunity Equity*  
15 *Partners, L.P. & Ors. [supra]*, the Court of Appeal said:

16  
17 *"The respondents submitted that on the basis that Brazil is clearly and distinctly the*  
18 *appropriate forum for the determination of the action the Mareva injunction should*  
19 *fall away and no new Mareva injunction should be granted. There was no dispute*  
20 *that in principle the court has jurisdiction to grant a Mareva injunction in aid of*  
21 *foreign proceedings notwithstanding that proceedings for substantive relief in the*  
22 *Cayman courts have been stayed in favour of proceedings in Brazil. In Channel*  
23 *Tunnel Group Ltd V. Balfour Beatty Ltd. [1993] AC 344, Lord Mustill laid down*  
24 *three conditions on which such relief may be granted: (a) the interim relief must be*  
25 *needed to render more efficacious the procedures and any decision favourable to the*  
26 *appellants that emerge therefrom; (b) the court should approach such an order with*  
27 *utmost caution: and (c) the court should be prepared to act only when the balance of*  
28 *advantage plainly favours the grant of relief....*

29  
30 *.... Walsh & Ors. v. Deloitte & Touche, Inc., judgment by the Privy Council dated 17*  
31 *December 2001. ... was a case from The Bahamas and was directly concerned with*  
32 *the grant of a worldwide Mareva injunction. The Privy Council expressly applied the*  
33 *Channel Tunnel decision to the Mareva injunction situation where it is intended that*  
34 *such an injunction should be issued in aid of a foreign jurisdiction after the stay of*  
35 *proceedings in the domestic court. The Privy Council held that as the proceedings for*  
36 *a Mareva injunction of a foreign court are interlocutory, it is not necessary for the*  
37 *applicant to show that he is likely to succeed in establishing such a cause of action.*  
38 *For the purposes of the threshold requirement it is sufficient, if upon the material*  
39 *before the court, the appellant appears to have a good arguable case." (emphasis*  
40 *added)*

41  
42  
43 Where a defendant is served within the Cayman Islands with proceedings claiming  
44 substantive relief there is again jurisdiction to grant a freezing order in aid of foreign  
45 proceedings, even though the parties have no intent to litigate the substance of their dispute in  
46 the Cayman Islands (see the decision of the Court of Appeal in *Deloitte & Touche, Inc. v*  
47 *John B Felderhoff & Ors [supra]*). In that decision, the Court of Appeal also considered the  
48 so-called *Chabra* jurisdiction against non-cause-of-action defendants:

49

1           *"...For the purpose of the present appeal it is sufficient to note that this Court [in*  
2 *SAAD ...(CICA 1 of 2010)] adopted, with approval, the proposition stated at sub-*  
3 *paragraph 51(iii) of Justice Henderson's judgment in the Ahmad Hamad Algozaibi*  
4 *and Brothers Company v Saad Investments Company Limited et al [supra]case. In*  
5 *the words of this Court (at paragraph 22 of its judgment):*

6  
7           *'...there is jurisdiction to grant a Mareva injunction against an NCAD [a non-cause-*  
8 *of-action defendant] in a case where such an injunction would be ancillary and*  
9 *incidental to the effective enforcement of a prospective judgment against a defendant*  
10 *against whom there is a pleaded cause of action (a "Cause-of-action defendant") or*  
11 *"CAD") because the assets of the NCAD – that is to say, assets to which the NCAD is*  
12 *itself entitled beneficially (as well as assets in which the CAD has a beneficial*  
13 *interest) – may become available to satisfy a judgment against the cause-of-action*  
14 *defendant.'*

15  
16           *It was submitted in the skeleton argument lodged on behalf of the appellants (at*  
17 *paragraph 34) that the so-called Chabra jurisdiction does not extend to permit a*  
18 *court in this jurisdiction to grant a freezing injunction "in aid of a proceeding in a*  
19 *foreign court" where (a) the cause of action pleaded in the foreign jurisdiction is not*  
20 *justiciable in this jurisdiction and (b) "the person whose assets are to be frozen is not*  
21 *a party defendant in the foreign jurisdiction."*

22  
23           *...But, as Justice Henderson had recognized in the Algozaibi [supra] case, the Chabra*  
24 *jurisdiction is not limited to assets which are held by the non-cause-of-action*  
25 *defendant for the benefit of the cause-of-action defendant: it extends to assets to*  
26 *which the non-cause-of-action defendant is entitled beneficially which may (perhaps*  
27 *through some judicial process) become available to satisfy a judgment against the*  
28 *cause-of-action defendant. The relevant question, therefore, is whether in relation to*  
29 *assets in the latter category, the Caymanian courts have no power to grant Mareva*  
30 *relief against Mrs Felderhof because she is not a party to the proceedings pending*  
31 *against Mr Felderhof and others in Ontario.*

32  
33           *In my view, the answer to that question is plainly "No". The purpose of the*  
34 *Chabra jurisdiction is to ensure that enforcement of a future judgment of the court*  
35 *against a cause-of-action defendant is not frustrated by the dissipation of assets (in*  
36 *the hands of the non-cause-of-action defendant) which would or might otherwise be*  
37 *or become available to satisfy that judgment. The principle was explained by the*  
38 *High Court of Australia in Cardile v Led Builders Pty Ltd [1999] HCA 18; 198 CLR*  
39 *380..."*

40  
41           *In Catherine Margaret Gillies-Smith v George Bruce Smith [supra], the writ of summons*  
42 *claimed "An injunction prohibiting the defendant, until the final determination of proceedings*  
43 *between the plaintiff and the defendant before the Superior Court of Justice Family Court*  
44 *Branch in Ontario, Canada ... from removing from the Cayman Islands, or in any way*  
45 *disposing of, or dealing with, or diminishing, the value of any of its assets which are in the*  
46 *Cayman Islands, whether in his own name or not, and whether solely or jointly owned up to*  
47 *the value of CAD\$3.5 million", including certain specified assets, being a property and*  
48 *money in two bank accounts. The plaintiff made an application to Quin J for ex parte relief*  
49 *"to freeze [these] assets, in the Cayman Islands, in the defendant's own name or whether*  
50 *solely or jointly owned, up to the value of CAD\$3.5 million".*

1  
2 Mr. Justice Quin set out at paragraphs 20 to 40 the law. At paragraph 41 he concluded that,  
3 having read the plaintiff's affidavit sworn in the Ontario proceedings and reviewed the case  
4 law in other jurisdictions which followed Lord Nicholls' dissenting judgment in *Mercedes*  
5 *Benz v Leiduck*, [supra], he was satisfied that the plaintiff had a justiciable cause of action in  
6 the Cayman Islands, namely to give effect to the injunction issued by the Superior Court of  
7 Justice and was entitled to an injunction in the Cayman Islands until the final determination  
8 of proceedings in Ontario between the plaintiff and the defendant.

9  
10 In granting leave to serve out, Quin J said:

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

19  
20 *'All that is required is that in the action an injunction is sought concerning acts or*  
21 *omissions of the Defendant within the territorial jurisdiction of the Court.'*

22  
23 *Having heard the submissions of the Plaintiff's counsel and having read the evidence*  
24 *contained in the Plaintiff's affidavit I find that this is an appropriate case to give the*  
25 *Plaintiff leave to serve the Defendant out of the jurisdictions and I so order."*

26  
27 The decision of Quin J is to be treated with the greatest respect. I point out that it is possible  
28 that the wife in that case was asserting a proprietary claim. I fully accept and support Quin J's  
29 concern to give effect to "the principles of judicial and international comity" to the extent that  
30 there is jurisdiction to do so.

31  
32 I refer to *Ernest Ferdinand Perez de Lasala v. Hannelore de Lasala* 1980 AC 546, where  
33 Lord Diplock made the following observations as to judicial precedent at page 558:

34  
35 *"Different considerations, in their Lordships' view, apply to decisions of the*  
36 *House of Lords on the interpretation of recent legislation that is common to Hong*  
37 *Kong and England. Here there is no question of divergent development of the*  
38 *law. The legislature in Hong Kong has chosen to develop that branch of the law on*  
39 *the same lines as it has been developed in England, and, for that purpose, to*  
40 *adopt the same legislation as is in force in England and falls to be interpreted*  
41 *according to English canons of construction. What their Lordships have already*  
42 *said about the common membership of the Judicial Committee of the Privy*  
43 *Council and the Appellate Committee of the House of Lords applies a fortiori to*  
44 *decisions of the House of Lords on interpretation of recent English statutes that*  
45 *have been adopted as the law of Hong Kong. Since the House of Lords as such is not*  
46 *a constituent part of the judicial system of Hong Kong it may be that in juristic*  
47 *theory it would be more correct to say that the authority of its decision on any*  
48 *question of law, even the interpretation of recent common legislation, can be*  
49 *persuasive only: but looked at realistically its decisions on such a question will*

1           *have the same practical effect as if they were strictly binding, and courts in Hong*  
2           *Kong would be well advised to treat them as being so."*  
3

4           The decision of the Privy Council in *Mercedes Benz v Leiduck*, [supra] (in relation to  
5           identical wording to that found in GCR Order 11, rule 1(1)(b), without the additional words  
6           containing the proviso), is authority that, in my opinion, I must follow, having regard to Lord  
7           Diplock's observations. In my view, the additional words in the proviso cannot on any view  
8           be said to widen the effect of Order 11, rule 1(1)(b) as considered by the Privy Council in  
9           *Mercedes Benz v Leiduck*, [supra].

10  
11           The Court of Appeal in *Telesystem International Wireless Inc. and TIW Do Brasil Ltd v*  
12           *CVC/Opportunity Equity Partners, L.P. & Ors*. [supra] said that:

13  
14           *"The Privy Council [in Walsh & Ors v Deloitte & Touche Inc] ... held that as the*  
15           *proceedings for a Mareva injunction [in aid] of a foreign court are interlocutory ..."*  
16

17           I consider that I am bound to follow the conclusion of the Court of Appeal that proceedings  
18           for a *Mareva* injunction in aid of proceedings before a foreign court are interlocutory. (See  
19           further the commentary in Dicey quoted above).  
20

21           In these circumstances, I must decline to make an order for service out against the First  
22           Defendant. In doing so, I observe that relief against the First Defendant is not needed if (see  
23           below) relief is granted for a limited period of time against the Second and Third Defendant.  
24           It will, of course, be open to the Plaintiff to challenge the refusal of leave to serve out against  
25           the First Defendant in the Court of Appeal, and if and to the extent that permission to appeal  
26           is needed, I grant it.  
27

### 28 29           **The Second and Third Defendants** 30

31           As to the Second and Third Defendants, these defendants are Cayman registered companies  
32           and can be served here without any need for leave to serve out. There is no Cayman Island  
33           authority which supports the application for a freezing order against D2 and D3 in  
34           circumstances where the court has not granted leave to serve out against D1.  
35

36           The most potentially persuasive authority that Mr. Meeson relies on in support of the  
37           application for a freezing order against D2 and D3, in circumstances where the court has not  
38           granted leave to serve out against D1, is the decision of Bannister J in the BVI in *Black Swan*  
39           *Investment I.S.A v Harvest View Limited and Sablewood Real Estate Limited* [supra], as  
40           explained by Bannister J in *Yukos CIS Investment Ltd and Winacanto Holdings BV v Yukos*  
41           *Hydrocarbons Investments Limited et al* [supra]. At paragraph 16 of his judgment in *Yukos*  
42           *CIS Investment Ltd and Winacanto Holdings BV v Yukos Hydrocarbons Investments Limited*  
43           *et al* [supra] Bannister J said:

44  
45           *[16] In effect, that leaves the 'free standing' Black Swan [supra] jurisdiction as the*  
46           *only basis for the grant of any of the relief sought by the claimants. Black Swan*  
47           *[supra] was a pure freezing order case based upon the fact that the claimant was*  
48           *pursuing in South Africa a money claim against the owner of two companies*  
49           *incorporated in the BVI. The order made by the Court of Appeal and continued by*  
50           *myself froze the assets of the two BVI companies in support any money judgment*

1           *which the claimant might obtain in South Africa. Black Swan [supra] rests upon the*  
2           *willingness of the court, in a case where the defendant to foreign proceedings has*  
3           *assets within its jurisdiction, to act in aid of the claimant's prospective entitlement to*  
4           *a money judgment if successful in the foreign proceedings. It depends upon the*  
5           *assumption that the foreign money judgment will be enforceable, by registration or*  
6           *otherwise, in the court within whose jurisdiction the assets are situated. It is this last*  
7           *feature which founds the jurisdiction [see per Lord Nicholls in Mercedes Benz v*  
8           *Leiduck, [supra]].*

9  
10          I am persuaded, not without considerable hesitation, that I should grant holding relief against  
11          D2 and D3 for a limited period of time so that the question whether "the free-standing Black  
12          Swan jurisdiction" should be held to exist in the Cayman Islands, can be fully argued..

13  
14          For present purposes, I am persuaded that the Plaintiff has a good arguable case against D2  
15          and D3, in the light of the decisions of Bannister J (if correct), and that it is expedient to grant  
16          the relief sought so that the Grand Court can consider whether the "free-standing Black Swan  
17          jurisdiction" should be held to exist in the Cayman Islands. I am in addition satisfied that, on  
18          the material before me, all other conditions necessary to the grant of this relief are met.  
19          Further, I refer to the judgment of Roth J for its full terms and effect.

20  
21          I propose, therefore, to grant limited relief against D2 and D3 until the hearing of an  
22          application by D2 and D3 to set aside this order, or until the hearing of an application by the  
23          Plaintiff to continue this order, whichever is the earlier.

24  
25          An application by the Plaintiff to continue the order must be heard before the end of  
26          November. By the end of November, the application to set aside the permission to serve out  
27          granted by Chief Master Winegarten in the English Proceedings should have been heard.  
28          Further, the results of the applications in the BVI and Cyprus will by then be known.

29  
30          I also propose to make a much narrower order for the disclosure of information by D2 and D3  
31          than that sought by the Plaintiff. Having regard to the overriding objective, in my opinion, if  
32          no assets of the First Defendant are caught by the order I propose to make, the sooner this is  
33          clarified the better, so as to save time and costs.

34  
35          I add the following:

36  
37          I have drawn attention to the fact that there is no equivalent of section 25 of the Civil  
38          Jurisdiction and Judgments Act or section 44 of the Arbitration Act 1996 in the Cayman  
39          legislation. It follows, of course, that there are no related rules enabling service of such  
40          proceedings to be made with permission outside the jurisdiction.

41  
42          The separation of powers is essential to democracy in the Cayman Islands. Without intending  
43          in any way to trespass on the role of the legislature, I respectfully suggest that urgent  
44          consideration should be given by the Law Reform Commission to whether legislation  
45          equivalent to section 25 of the Civil Jurisdiction and Judgments Act 1982 and section 44 of  
46          the Arbitration Act 1996 should be introduced in the Cayman Islands. Further, the issues  
47          raised herein call for urgent consideration (to the extent appropriate) by the Rules Committee.

1 I respectfully refer to:  
2

- 3 (a) The public policy considerations referred to by the Court of Appeal in *Telesystem*  
4 *International Wireless Inc. and TIW Do Brasil Ltd v CVC/Opportunity Equity*  
5 *Partners, L.P. & Ors. [supra]* (the status of the Cayman Islands as an advanced  
6 and reputable financial centre and as a jurisdiction which can and does deal with  
7 international disputes between parties who use Cayman Islands companies in their  
8 structure).  
9
- 10 (b) The public policy considerations referred to in *Catherine Margaret Gillies-Smith v*  
11 *George Bruce Smith, [supra]*.  
12
- 13 (c) The public policy factors referred to by the Court of Appeal of Jersey in *Solvalub*  
14 *Limited v Match Investments Ltd [supra]* (cited with approval by the Court of  
15 Appeal in *Telesystem International Wireless Inc. and TIW Do Brasil Ltd v*  
16 *CVC/Opportunity Equity Partners, L.P. & Ors. [supra]*):  
17

18 *"If the Royal Court were to adopt the position that it was not willing to*  
19 *lend its aid to courts of other countries by temporarily freezing the assets*  
20 *of defendants sued in those other countries that ... would amount to a*  
21 *serious breach of the duty of comity which courts in different jurisdictions*  
22 *owe to each other. Not only so, but the consequence of such an attitude*  
23 *would be that Jersey would quickly become known as a safe haven for*  
24 *persons wishing to evade liabilities imposed on them by the courts to*  
25 *which they are subject. That is exactly the reputation which any financial*  
26 *centre strives to avoid and Jersey so far has avoided with success."*  
27

28 In my opinion, it is highly desirable that considerations as important as these should be  
29 urgently considered by the Law Reform Commission and (to the extent appropriate) by the  
30 Rules Committee, so that the extent of the relevant jurisdiction of the Grand Court is clearly  
31 identified.  
32

33  
34 DATED this 28<sup>th</sup> day of September 2011

35 *Cresswell J*  
36  
37 The Honourable Justice Cresswell  
38 Judge of the Grand Court  
39 The Hon. Sir Peter Cresswell  
Judge of the Grand Court

