IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA 1 of 2012
CACV001/2012
(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 -

UNIVERSAL TELECOM MANAGEMENT
UNIVERSAL TELECOME INVESTMENT STRATEGIES FUND SPC

Defendants/Respondents

Mr Clive Freedman QC with **Mr Nigel Meeson QC**, **Ms Linda DaCosta** and **Mr Benjamin Hart** of Conyers Dill and Pearman appeared for the Appellant
Mr Michael Swainston QC with **Mr James Eldridge** and **Mr Jan Golaszewski** of Maples and Calder appeared for the Respondents

Hearing Date: 13 and 14 February 2012
Judgment: 4 June 2013

JUDGMENT

Sir John Chadwick, President:

1. This appeal is from an order made on 10 January 2012 by Justice Sir Peter Cresswell in proceedings brought by VTB Capital Plc ("VTB Capital" or "the claimant"), a company incorporated in England and Wales, against Konstantin Malofeev, a Russian citizen based (it is said) in Moscow and two companies incorporated in the Cayman Islands, Universal Telecom Management and Universal Telecome Investment Strategies Fund SPC ("the Cayman Islands companies"). By that order the judge dismissed the claimant's application, made by summons issued on 28 September 2011, for the continuation against the two Cayman Islands companies of *Mareva* relief

which he had granted *ex parte* on 19 August 2011. In dismissing that application, after an *inter partes* hearing, the judge held that there was, and had been, no power to grant such relief in the circumstances of this case. The principal issue raised by the appellant's notice was whether the judge was correct to take that view.

The underlying claim in relation to which Mareva relief is sought against the two Cayman Islands companies

2. VTB Capital is a bank carrying on investment business in the United Kingdom. In November 2007 it advanced US$225,050,000 by way of loan to Russagroprom LLC ("RAP"), pursuant to a facility agreement dated 23 November 2007. The ostensible purpose of the loan was to assist RAP in the purchase from Nutritek International Corp ("Nutritek") of shares in Newblade Limited ("Newblade"). Nutritek and Newblade were companies incorporated in the British Virgin Islands.

3. Newblade owned and operated a number of dairy companies in Russia. VTB Capital contends that the loan was procured by fraud; in that it had been represented (falsely) (i) that the sale by Nutritek to RAP was a bargain at arm's length - whereas, in fact (it is said) both companies were controlled and owned by Mr Malofeev, the ultimate beneficial owner of each - and (ii) that the sale was at a price (US$366 million) which was at or above the market value of the underlying asset (the dairy companies), as reported by Ernst & Young based on information provided by Nutitrek – whereas, in fact, the true market value was much less than that figure.

4. RAP defaulted on the loan. VTB Capital sought to enforce its security over the shares in Newblade. It then became clear that the dairy companies had been over-valued in the Ernst & Young report. It is said that, after realizing its security, VTB Capital will be left with a shortfall of US$185 million or thereabouts.

5. VTB Capital commenced proceedings in the High Court of Justice of England and Wales (Case No HC10C04611) against Nutritek, Marshall Capital LLC (a Russian corporation), Marshall Capital BVI (a British Virgin Islands Company, said to be owned indirectly by Mr Malofeev and to own or control Nutritek and RAP) and Mr Malofeev. On 11 May 2011 the English Court gave leave to serve those proceedings out of the jurisdiction. On 5 August 2011 that Court granted a worldwide freezing order against (*inter alia*) Mr Malofeev.

The proceedings in this jurisdiction

6. Proceedings in this jurisdiction were commenced on 11 August 2011, shortly after the worldwide freezing order had been granted by the High Court in London. As I have said, Mr Malofeev and the two Cayman Islands companies were named as defendants to those proceedings. The writ was indorsed with a claim for relief in these terms (so far as material):

> "1. An injunction prohibiting the First Defendant [Mr Malofeev] 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 [Universal Telecom Management] and/or the Third Defendant [Universal Telecome Investment Strategies Fund SPC].
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> 2. An injunction prohibiting the Second Defendant and the Third Defendant, until the final determination of the English Proceedings, from dealing with or diminishing the value of any shares they hold in the Russian telecommunications entity 'Rostelecom', up to the value of US$200,000,000."

7. By summons issued on the same date, VTB Capital applied to the Grand Court *ex parte* for injunctions in those terms and for leave to serve the injunction sought against Mr Malofeev (if made) out of this jurisdiction. The summons did not, in terms, seek leave to serve the writ on Mr Malofeev out of the jurisdiction; but it has, I think, been common ground that such leave was a necessary pre-requisite to the injunctive relief that was sought against him.

8. That application came before Justice Sir Peter Creswell on 15, 16 and 18 August 2011. By an order made on 19 August 2011 the judge refused leave to serve the writ on Mr Malofeev out of the jurisdiction. In those circumstances he did not grant the injunction that was sought against Mr Malofeev. But the two Cayman Islands companies could, of course, be served in this jurisdiction. The judge granted interim injunctions against them in the terms sought.

9. The judge set out the evidence on which he relied in his judgment dated 28 September 2011:

> "The Plaintiff alleges that the First Defendant has assets in the Cayman Islands, namely his interests in the Second and/or Third Defendant, which are being used to hold shares in Rostelecom, and that he may be taking steps to dispose of or diminish those shares which would have the effect of preventing or impairing the Plaintiff's ability to recover the losses it claims in the English Proceedings. The Rostelecom shares are traded on the London and Frankfurt stock exchanges and on some Russian exchanges, including 'OTCQS'.
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> The evidence in support of the Plaintiff's contentions is set out in the affidavit evidence of Mr Riem and Mr Chernenko, filed in support of the English proceedings. The evidence alleges that:
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> (a) The First Defendant holds a very substantial shareholding in Rostelecom.
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> (b) The First Defendant's shareholding in Rostelecom is 7.4 percent of the issued shares which, with reference to the current market capitalization, is worth approximately US$1.48 billion.
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> (c) The Plaintiff has received information (see below) that the First Defendant holds his shareholding in Rostelecom through one or more Cayman Islands corporate entities (being the Second Defendant and the Third Defendant).
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> (d) The Plaintiff has been informed by Mr Chernenko, who has himself been informed by another confidential source, that the First Defendant is now seeking secretly to realize or conceal his shareholding in Rostelecom by using the Second Defendant and the Third Defendant (referred to collectively hereafter as 'the Cayman Entities'). The allegation is that the First Defendant is either liquidating his shares in the Cayman Entities by selling parcels of his shares on the open market at a value of US$15 million each, and/or seeking to obtain a loan secured on the remaining shares held by the Cayman Entities.
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> (e) The Plaintiff also contends that the First Defendant has numerous business interests which have recently been the subject of considerable scrutiny and adverse comment in Russia. The level of that scrutiny and adverse comment to which the First Defendant has been subject has, it is alleged, increased in recent weeks and the Plaintiff asserts that there is increasing incentive for the First Defendant to liquidate his assets and secrete them in jurisdictions around the world."

10. Later, in the same judgment, the judge explained the reasons why he was persuaded to grant interim injunctive relief:

". . . There is no Cayman Island authority which supports the application for a freezing order against D2 and D3 in circumstances where the court has not granted leave to serve out against D1.

The most potentially persuasive authority that Mr Meeson [counsel for the applicant] relies on in support of the application for a freezing order against D2 and D3, in circumstances where the court has not granted leave to serve out against D1, is the decision of Bannister J in the BVI in *Black Swan Investment I.S.A. v Harvests View Limited and Sablewood Real Estate Company Limited* [unreported, Eastern Caribbean Supreme Court, 23 March 2010] as explained by Bannister J in *Yukos CIS Investment Limited and Wincanto Holdings BV v Yukos Hydrocarbons Investments Limited et al.*[unreported, Eastern Caribbean Supreme Court, 6 August 2010]. At paragraph 16 of his judgment in *Yukos CIS Investment Limited and Wincanto Holdings BV v Yukos Hydrocarbons Investments Limited et al. [supra]* Bannister J said:

> '[16] In effect that leaves the 'free-standing' *Black Swan* [supra] jurisdiction as the only basis for the grant of any of the relief sought by the claimants. *Black Swan* was a pure freezing order case based on the fact that the claimant was pursuing in South Africa a money claim against the owner of two companies incorporated in the BVI. The order made by the Court of Appeal and continued by myself froze the assets of the two BVI companies in support of any money judgment which the claimant might obtain in South Africa. *Black Swan* rests upon the willingness of the court, in a case where the defendant to foreign proceedings has assets within its jurisdiction, to act in aid of the claimant's prospective entitlement to a money judgment if successful in the foreign proceedings. It depends upon the assumption that the foreign money judgment will be enforceable, by registration or otherwise, in the court within whose jurisdiction the assets are situated. It is this last feature which founds the jurisdiction [see per Lord Nicholls in *Mercedes Benz v Leiduck* [1996] 1 AC 284].

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

He granted interim, or "holding", relief against the two Cayman Islands companies "until the hearing of an application by D2 and D3 to set aside this order, or until the hearing of an application by the Plaintiff to continue this order, whichever is the sooner". He directed that an application to continue the order must be heard by the end of November 2011. He did so on the basis of an expectation that, by the end of November, the application to set aside the permission to serve the writ in the English proceedings on Mr Malofeev, then pending in those proceedings, would have been heard.

11. VTB Capital appealed to this Court from the judge's refusal to grant leave to serve the writ on Mr Malofeev out of the jurisdiction. That appeal came before this Court and was heard, *ex parte*, on 17 November 2011. This Court gave judgment, dismissing that appeal, on 30 November 2011. It upheld the judge's view that, notwithstanding the powerful dissenting opinion of Lord Nicholls of Birkenhead in *Mercedes Benz v Leiduck* [1996]1 AC 284, he was bound by the decision of the Privy Council in that case on what may be called the "territorial jurisdiction" question: that is to say, the question whether, assuming that (notwithstanding the decision in *The Siskina* [1979] AC 210) *Mareva* relief in support of foreign proceedings is permissible, the statutory enlargement of the court's territorial jurisdiction by Order 11 rule 1 enabled the court to permit service of proceedings claiming such relief on a foreigner who had no connection with its territory other than an interest in assets which could be found there.

12. In those circumstances the position in these proceedings in relation to Mr Malofeev is that (i) he remains, formally, a party to the proceedings, (ii) the only relief sought against him is the *Mareva* relief indorsed on the writ, (iii) the proceedings have not been served upon him, (iv) leave to serve the proceedings upon him out of this jurisdiction has been refused and (v) no order has been made against him.

13. By summons issued on 28 September 2011 – that is to say, immediately upon receipt of the judge's written judgment setting out the reasons which had led him to grant interim *Mareva* relief against the two Cayman Islands companies on 19 August 2011 – VTB Capital sought a continuation of the order of 19 August 2011. That summons came before the judge on 13 December 2011. On 10 January 2012, following the oral hearing and further written submissions (made necessary by the inability to complete the oral hearing in the time available), the judge dismissed the summons of 28 September 2011. He did so for reasons given in a judgment which he delivered orally on that day and which are set out in a revised and approved transcript of that judgment dated 16 January 2012. Interim *Mareva* relief was continued against the two Cayman Islands companies for a short period, sufficient to enable the claimant to seek permission to appeal to this Court. On 24 January 2012 that interim relief was continued by this Court until the hearing of the appeal or further order.

14. As I have said, the appeal now before this Court is from the order of 10 January 2012. The appeal was heard by this Court on 13 and 14 February 2012. The Court heard argument on the principal question to which I have already referred: whether the courts in these Islands have power to grant *Mareva* relief against parties who are not defendants to any cause of action ("non-cause-of action-defendants" or "NCADs") in circumstances where the party against whom substantive relief is claimed (the "cause-of action-defendant" or "CAD") is not subject to the jurisdiction of those courts. It gave permission for the appellant's notice to be amended to raise the question whether, if so, such relief should be granted against the Cayman Islands companies in the circumstances of this case; and heard argument on that question also. At the conclusion of the hearing the Court reserved its judgment. The Court did not continue the interim *Mareva* relief which had been granted by the judge on 10 January 2012 and extended on 24 January 2012; it was content to accept undertakings as to notice offered by counsel on behalf of the Cayman Islands companies.

15. The position in this jurisdiction, therefore, is that the Cayman Islands companies have been under no restraints by way of *Mareva* relief since 14 February 2012; but have been bound by undertakings given on their behalf. Those undertakings did not restrain the Cayman Island companies from dealing with or diminishing the value of any shares they hold in Rostelcom (or any other asset). They required only that notice be given to VTB Capital before certain steps were taken: in particular, (i) that the articles of association of Universal Telecome Investment Strategies Fund SPC ("the Fund") be amended so as to provide that any resolution by the holder of the Fund's Non-Voting Redeemable Participating Shares ("the Participating Shares") will not take effect until 21 days after it had been notified to the Fund and to VTB Capital, (ii) that notice be given to VTB Capital within five business days after receiving any request to redeem the Participating Shares, (iii) that the Fund would not waive or modify the notice requirements in respect of Participating Shares prescribed by its articles and the relevant information memorandum, (iv) that 21 days notice be given to VTB Capital by the Fund prior to paying any dividend, effecting any compulsory redemption of Participating Shares or otherwise making any distribution to the holder of such Participating Shares, or effecting any merger, and (v) that 21 days notice be given to VTB Capital by Universal Telecom Management ("the Manager"), prior to the passing of any special resolution transferring the Fund by way of continuation to a jurisdiction

other than the Cayman Islands. Further, the Manager and the Fund undertook that they would, as soon as practicable, give notice to VTB Capital if they became aware of any breach of those undertakings; the Manager undertook that it would notify VTB Capital as soon as practicable in the event that it ceased to hold or control the Fund's Management Shares or if it ceased to be the Investment Manager of the Fund; and the Fund and the Manager undertook that they would notify VTB Capital as soon as practicable upon receiving any notice to transfer the Participating Shares. So far as this Court is aware nothing has taken place since 14 February 2012 which required notice to be given to VTB Capital pursuant to those undertakings; and no application has been made to the Grand Court (or to this Court) for the discharge or variation of those undertakings (save that it is said that, in the light of developments in the English Proceedings, there is no longer any basis for any continuing relief in these proceedings and the undertakings should fall away).

The English proceedings

16. As I have said, the only relief sought against the two Cayman Islands companies in the proceedings in this jurisdiction was an injunction prohibiting them until the final determination of the English Proceedings - that is to say, the proceedings brought by VTB Capital against Mr Malofeev and others (but not against the Cayman companies) in the High Court of Justice of England and Wales to which reference has already been made - from dealing with or diminishing the value of shares held in 'Rostelcom'. In a letter dated 8 February 2013, written immediately after judgments were handed down by the United Kingdom Supreme Court on an appeal in the English Proceedings, Maples and Calder, attorneys for the Cayman companies, asserted that the English Proceedings "were wholly dismissed by the UK Supreme Court"; and that "it follows that this appeal must be dismissed in its entirety and our clients released from their undertakings". That assertion was repeated in a further letter from Maples and Calder, dated 25 February 2013, where it is said that "the English proceedings, on which the Cayman Islands freezing order was based, have been heard and dismissed, both by the English Court of Appeal and the Supreme Court . . .". If those assertions are correct – that is to say, if, on a true analysis, the English Proceedings have been finally determined - then it can indeed be said that there is no longer any relief claimed against the Cayman Islands companies in these proceedings (save, perhaps, costs); and that the appeal should be dismissed. It is necessary, therefore, to examine the position

in the English Proceedings in some detail in order to determine whether, in the events which have happened, those proceedings have been finally determined.

17. The claims in the English Proceedings, were originally pleaded on the basis of (i) fraudulent misrepresentations made by Nutritec, for which the other defendants to those proceedings were jointly liable, and (ii) conspiracy to commit that deceit. Permission to serve the writ in the English proceedings on Mr Malofeev and the other defendants out of the jurisdiction had been granted on 11 May 2011. On 5 August 2011 a worldwide freezing order had been granted in those proceedings. By summons dated 28 September 2011 Mr Malofeev and the other defendants who had been served applied to set aside the permission to serve out. In response, VTB Capital applied for leave to amend its particulars of claim to add a contractual claim; founded on the contention that they were entitled to pierce the corporate veil and hold the defendants (including Mr Malofeev) liable for RAP's borrowing under the facility agreement. That summons – together with the application to amend and a number of other applications, including an application to discharge the freezing order – came before Mr Justice Arnold on 2 November 2011.

18. The hearing of those applications extended over six days. Mr Justice Arnold delivered a written judgment on 29 November 2011. By an order made on that day, he set aside the order of 11 May 2011 (granting permission to serve the writ out of the jurisdiction), he refused permission to serve out of the jurisdiction and he discharged the worldwide freezing order. He also refused VTB Capital permission to amend its particulars of claim so as to add additional claims in contract against Mr Malofeev and the Marshall companies.

19. Mr Justice Arnold granted permission to appeal in respect of the refusal of permission to amend; but not otherwise. On 5 December 2011 and, further, on 19 January 2012 the Court of Appeal of England and Wales granted permission to appeal on all remaining issues. At the hearing on 5 December 2011, the Court of Appeal continued the worldwide freezing order over until the determination of the appeal.

20. At the hearing of this appeal in February 2012 this Court was told that the appeal against Mr Justice Arnold's order of 29 November 2011 was fixed for hearing before the Court of Appeal of England and Wales over five days commencing on 19 March

2012. Matters have since moved on in the English proceedings. The Court of Appeal heard the appeals from Mr Justice Arnold's order in March 2012, as expected. On 20 June 2012 it handed down judgment, [2012] EWCA Civ 808. It dismissed the appeal from the judge's refusal to allow the introduction of a contractual claim by amendment (at paragraph 88 of its judgment) - holding that the facts alleged did not permit the piercing of the corporate veil – and dismissed the appeal from the judge's decision to set aside the orders granting permission to serve the writ out of the jurisdiction (paragraph 168 of its judgment). In those circumstances the Court of Appeal of England and Wales did not find it necessary to address the question whether (if the order to serve the writ out of the jurisdiction had been upheld) it would have been appropriate to continue the worldwide freezing order.

21. Following that judgment, by an order made on 22 June 2012, the Court of Appeal continued the worldwide freezing order which it had granted on 5 December 2011 for a short period to enable VTB Capital to apply to the Supreme Court of the United Kingdom for permission to appeal; and, thereafter, if permission were granted, until the determination of that appeal. In the course of a short judgment delivered after the hearing on 22 June 2012, [2012] EWCA Civ 866, the Court said this (at paragraph 12):

> "Arnold J made an order for an enquiry as to damages on the Claimant's cross undertaking in relation to the WFO, but that has been stayed pending the appeals to the Court of Appeal. That stay will continue, but if the enquiry is eventually proceeded with, then it is to extend to any loss caused both by the continuation of the WFO pending the appeal to the Court of Appeal and by its further continuation in pursuance of our own order. That will avoid the need for what would formally be separate enquiries into similar loss for different periods."

22. On 26 July 2012 the Supreme Court granted permission to appeal; and continued the worldwide freezing order. The appeal to the Supreme Court was heard over three days commencing on 12 November 2012. Judgments were delivered on 6 February 2013, [2013] UKSC 5. The Supreme Court dismissed the appeal: by a majority (Lord Neuberger PJSC, Lord Mance and Lord Wilson JJSC, Lord Clarke and Lord Reed JJSC dissenting) on the question of permission to serve out of the jurisdiction and unanimously on the question of permission to amend so as to introduce a contractual claim based on piercing the corporate veil. The Court was unanimous, also, in holding that the worldwide freezing order granted on 5 August 2011 should remain discharged;

and that the temporary freezing order granted on 22 July 2012 should also be discharged. Lord Wilson, with whose observations on this point Lord Neuberger expressly agreed, took the view (at paragraph 160 of his judgment) that "in retrospect the Court of Appeal should have determined VTB's appeal against the judge's ruling [that he would have discharged the worldwide freezing order in any event]"; and went on to say this:

> "160 . . .The degree of economic inhibition caused to a person in the position of Mr Malofeev by a worldwide freezing order made in England remains to be seen. At first sight, however, he is entitled to complain that it was an oppressive restraint on his economic activities. Whether he is correct to say that it has caused considerable prejudice to him will no doubt be the subject of inquiry in his application, already issued but so far stayed, for VTB to be ordered to compensate him for his losses pursuant to its cross-undertaking attached to the freezing order."

23. In the light of those observations, it seems to me impossible to hold that the English Proceedings have been finally determined. It is plain that both the Court of Appeal and Lord Wilson thought that the proceedings were continuing: at least for the purpose of the inquiry as to damages under VTB Capital's cross-undertaking. In those circumstances it is not open to this Court, as it seems to me, to accept the respondents' submission that this appeal must be dismissed on the ground that the English Proceedings have been finally determined. I am not satisfied that that is the true position.

24. What can be said, however, is that, although the English Proceedings continue for that limited purpose (at the least) and Mr Malofeev remains a party to those proceedings (in which substantive relief is sought against him), the effect of the decision made by the Supreme Court is that VTB Capital's claims against him in those proceedings cannot be pursued so long as he remains in Russia (or elsewhere outside the jurisdiction of the English court). Further, he is not now subject to a worldwide freezing order (or any freezing order) granted by the English courts in those proceedings.

25. I must turn, therefore, first, to the question whether Justice Sir Peter Cresswell was correct to take the view that he had no jurisdiction to make, or to continue, the freezing order that he made on 19 August 2011 (following the *ex parte* hearing). If the answer to that question is "No", I must go on to consider whether, in the circumstances as they now are, the respondents should, nevertheless, be discharged from the undertakings given on their

behalf on 14 February 2012; or whether (as VTB Capital submits by its appeal) they should be the subject of a freezing order granted against them.

The judgment of 16 January 2012

26. In order to address the first of those questions, it is necessary to examine the reasons which led Justice Sir Peter Cresswell to the conclusion which he reached.

27. The judge referred to the relief sought against the two Cayman Islands companies in these proceedings – that is to say *Mareva* relief against a party (an NCAD) against whom no cause of action is pleaded – as "*Chabra* type" relief. He did so on the basis that an early example of the grant of such relief is found in the decision of Mr Justice Mummery in *TSB Private Bank International SA v Chabra and another* [1992] 1 WLR 231, [1992] 2 All ER 245. He began his analysis with a summary of the current state of the law in this jurisdiction as he understood it. He identified, correctly, two distinct questions: first, whether Order 11, rule 1(1) of the Grand Court Rules permitted service out of the jurisdiction of a writ seeking *Mareva* relief on a party against whom no cause of action was alleged in the proceedings; and, second, whether the courts in this jurisdiction had power to grant *Mareva* relief against a party against whom no cause of action was alleged (an "NCAD") who could be served with the writ, either under Order 11 rule 1(1) or independently of that rule (because, for example, as in the present case, they could be served within the jurisdiction).

28. The first of those questions had been addressed by the judge in his earlier judgment of 28 September 2011; in the course of which he explained his reasons for refusing permission to serve these proceedings on Mr Malofeev out of this jurisdiction. As I have said, the judge's conclusion – that GCR O.11 r.1(1) did not permit service out of the jurisdiction of a writ on a party against whom no cause of action was alleged in the proceedings – was upheld by this Court for the reasons set out in the judgments handed down on 30 November 2011. That question does not arise in relation to the service of these proceedings on the two Cayman Islands companies. It is not in dispute that the two companies could be served – and were served – at their registered offices within the jurisdiction. In relation to the two Cayman Islands companies it was the second question (and only the second question) which the judge needed to address.

29. The judge then set out three propositions in relation to what he described as "The General Power to Grant Mareva Injunctions": (i) where a defendant is served within the Cayman Islands with proceedings claiming substantive relief, there is jurisdiction to grant a domestic or, exceptionally, a worldwide *Mareva* injunction; (ii) where a defendant is served out of the jurisdiction of the Cayman Islands with leave of the Grand Court with proceedings claiming substantive relief in one or more of the cases permitted by GCR Order 11, there is jurisdiction to grant a domestic or, exceptionally, a worldwide *Mareva* injunction; and (iii) on the present state of the law, a claim for a *Mareva* injunction alone does not found jurisdiction to grant leave to serve out. The first two of those propositions are not in dispute; but are not in point in the present case. The two Cayman Islands companies are not defendants against whom substantive relief is claimed. The third proposition restates the conclusion reached by this Court in its judgments of 30 November 2011.

30. The judge went on to set out three propositions relating to the "Power to Grant *Mareva* Injunctions in Aid of Foreign Proceedings": (i) there is no provision in this jurisdiction equivalent to section 25 of the United Kingdom Civil Jurisdiction and Judgments Act 1982 (as extended by the Civil Jurisdiction and Judgments Act (Interim Relief) Order 1997 (SI 1997 No 302); (ii) where a defendant is served within the Cayman Islands with proceedings claiming substantive relief, there is jurisdiction to grant a freezing order in aid of foreign proceedings when the proceedings (for substantive relief in the Grand Court) against the defendant (served in the Cayman Islands) are stayed; and (iii) where a defendant is served within the Cayman Islands with proceedings claiming substantive relief, there is jurisdiction to grant a freezing order in aid of foreign proceedings, notwithstanding that the parties have no intent to litigate the substance of their dispute in the Cayman Islands. Again, those propositions are not in dispute; but, again, they are not in point in the present case. As I have said, the two Cayman Islands companies are not defendants against whom substantive relief is claimed.

31. The judge then turned to what he had described as the *Chabra* jurisdiction: that is to say (as he put it) "Jurisdiction to grant a *Mareva* injunction against a NCAD in a case where such an injunction would be ancillary and incidental to the effective enforcement of a prospective judgment against a CAD". He observed that: "The principles governing the grant of *Chabra* type relief in the Cayman Islands have been considered in the decisions

of the Court of Appeal in *Ahmad Hamad Algosaibi and Brothers Company v Saad Investments Company Ltd and others* (15 February 2011) and *Deloitte & Touche, Inc. v John B Felderhof & Ors"*. He summarised those principles (as he understood them) in the following passage of his judgment:

> "The Grand Court has jurisdiction to grant a *Mareva* injunction against a NCAD (a non-cause of action defendant) in a case where such an injunction would be ancillary and incidental to the effective enforcement of a prospective judgment against a defendant against whom there is a pleaded cause of action (a "cause of action defendant" or "CAD") because assets to which the NCAD is itself entitled beneficially (as well as assets in which the CAD has a beneficial interest) may become available to satisfy a judgment against the cause of action defendant (*Saad* para 22 and *Felderhof* para 41).
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> The purpose of the *Chabra* jurisdiction is to ensure that enforcement of a future judgment of the Court against a cause-of-action defendant is not frustrated by the dissipation of assets (in the hands of the non-cause of action defendant) which would or might otherwise be or become available to satisfy that judgment (*Felderhof* para 46).The principle was explained by the High Court of Australia in *Cardile v Led Builders Pty Ltd* [1999] HCA 18; 198 CLR 380;162 ALR 294;73 ALJR 657 at para 57 quoted at para 46 of the decision in *Felderhof*."

32. The judge then set out the submission made on behalf of the claimant, VTB Capital:

> "Mr. Freedman's central submission is as follows. Where a non-cause of action defendant ('NCAD') is amenable to the jurisdiction of the Grand Court because he/she/it resides here, the Grand Court has power to grant *Chabra* type relief in aid of proceedings in a foreign court against a cause of action defendant ('CAD') in the foreign court, notwithstanding that the NCAD is not before the foreign court and the CAD is not amenable to the jurisdiction of the Grand Court."

He identified, as the principal question raised by that submission, whether "*Chabra* relief is available in the Cayman Islands where there is no CAD in the proceedings in the Cayman Islands?"

33. He answered that question in the negative. He said this:

> "I do not consider that I have jurisdiction to grant the order sought for, among others, the following reasons:
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> (1) The current state of the law as to *Mareva* injunctions and the *Chabra* jurisdiction is as set out above.
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> It is important to note that the present case does not involve any proprietary claims (for example, proprietary claims arising from a breach of trust, see Snell's Equity 31st Ed, paragraph 28-32 and following.

(2) There is no equivalent of section 25 of the Civil Jurisdiction and Judgments Act 1982 or of section 44 of the Arbitration Act 1996 in the Cayman Islands legislation. Nor, importantly, are there any related rules enabling service of such proceedings to be made with permission outside the jurisdiction of the Grand Court. I emphasise the absence of both the statutory provisions and the related rules in the Cayman Islands.

(3) If the circumstances of the present case were the other way around, i.e. if the principal litigation was in the Cayman Islands and there were assets in England and Wales and *Mareva* relief was sought in London in support of orders made by the Grand Court, the judge's power to grant relief in aid of the proceedings here would be by reference to section 25 of the 1982 Act (interim relief in England and Wales and Northern Ireland in the absence of substantive proceedings) and the related rules.

(4) The Court of Appeal has upheld the order I made refusing leave to serve out against Mr. Malofeev. The Court of Appeal said:

> "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.*"

(5) The present application against D2 and D3 is for *Chabra* type relief. The state of the law in the Cayman Islands is as set out . . . above. The relevant principles require a CAD as well as a NCAD. There is no CAD in the present case following the decision of the Court of Appeal.

(6) It is elementary that I am bound by decisions of the Court of Appeal. Sir John Chadwick, President, in two full and carefully reasoned

decisions, (*Saad* and *Felderhof*), has set out the nature, extent and principles that govern the *Chabra* jurisdiction in the Cayman Islands. I respectfully refer to his analysis.

Mr. Freedman's central submission finds no support in the two judgments. In particular, but without limitation, I refer to the following statements in *Saad* and *Felderhof* which show that a CAD is central to the *Chabra* jurisdiction.

First, the statements of principle identifying the nature and extent of the jurisdiction set out . . . above, drawn from *Saad* at para 22 and *Felderhof* at paragraphs 41 and 46.

Second at paragraph 33 of his judgment in *Saad*, the President said:

> 'The fact that the potential judgment debtor (the CAD) has substantial control over assets which are held by a party against whom no cause of action is alleged (the NCAD) . . . is likely to be of critical importance in relation to the question whether there is a real risk that the assets will be dissipated or otherwise put beyond the reach of the claimant. . . . It is not enough that the CAD could, if it chose, cause the assets held by the NCAD to be used to satisfy the judgment. It is necessary that the court be satisfied that there is good reason to suppose either (i) that the CAD can be compelled (through some process of enforcement) to cause the assets held by the NCAD to be used for that purpose; or (ii) that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD.'

Third at paragraph 80, the President said:

> 'I am satisfied that Justice Anderson erred in principle in continuing the *Mareva* relief against the defendants in respect of whom it could not be said (A) that either (i) the claimant had a good cause of action against them; or (ii) that following a judgment against another defendant (against whom the claimant did have a cause of action) there was reason to suppose that the claimant would be able to invoke some process of enforcement which will lead to the assets (if any), of the non-cause of action defendant NCAD, becoming available to satisfy that judgment; and (B) that either (i) there was reason to suppose that the defendant had some assets which (absent *Mareva* relief) were at risk of dissipation; or (ii) that there was a real prospect that assets would be transferred to, or otherwise acquired by, that defendant in the future which would (a) then become available to satisfy a judgment (whether against that, or some other defendant); and (b) would (absent *Mareva* relief) be at risk of dissipation while held by that defendant.'

If the Plaintiff's contentions were correct, the President would not have set out the relevant principles as above. It is clear that there has to be CAD in the proceedings in the Cayman Islands.

(7) The President's reference at paragraph 16 of his judgment in this matter to decisions was, in my view, a reference to the decisions referred to above.

Further, when the President said at paragraph 25,

> '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?"

I understand the President to be saying that a *Mareva* injunction can be granted in aid of foreign proceedings in the circumstances which obtained in *Felderhof* . . . i.e. where a defendant is served within the Cayman Islands with proceedings claiming substantive relief.

(8) No pre-section 25 of the Civil Jurisdiction and Judgments Act 1982 case in England and Wales has been drawn to my attention where the court granted relief similar to the relief sought on the present application.

(9) The analysis set out above is, in my view, consistent with the section in *Gee on "Commercial Injunctions"* 5th Ed. at 1.025-1.029 on 'Free-standing *Mareva* relief, *The Siskina*, section 25 CJJA 1925, and later developments'.

(10) The decisions of the Court of Appeal referred to above provide no support or room for a *Black Swan* type jurisdiction in the Cayman Islands. I refer to the decision of Bannister J in *Black Swan* as explained by Bannister J in *Yukos* (see the quotation in my first judgment at pages 23 and 24) and to the decision in *Yukos* of the Eastern Caribbean Court of Appeal. The latter decision did not involve the *Chabra* jurisdiction. I have the greatest respect for the BVI decisions and the underlying policy considerations, but in my opinion they are not in accord with the current state of the law in the Cayman Islands as determined by the decisions of the Court of Appeal referred to above.

(11) According to a summary of the current position placed before the Court:

> 'The Law Reform Commission is currently examining two interrelated issues. The first deals with the enforcement of foreign judgments generally and in particular judgments emerging from UK courts. In this regard, we are seeking to

> identify the deficiencies in our Foreign Judgments Reciprocal Enforcement Law (1996 Revision) against the background of the UK Administration of Justice Act 1920 and the UK Reciprocal Enforcement of Judgments (Administration of Justice Act 1920, Part II) (Amendment) Order 1985. The 1985 Order was extended to the Cayman Islands in order to facilitate enforcement of Cayman judgments in UK. However, there appears to be no reciprocating measure in place. We also intend to seek advice from the Foreign Commonwealth Office to further clarify our statutory obligations as they relate to the enforcement of UK judgments.
>
> The second issue is being examined against the background of Quin J's decision in the *Gillies-Smith* case and Cresswell J's decision in the *VTB Capital PLC* case. The primary issue for consideration is what legislative action should be taken in Cayman to facilitate interim relief in cases where proceedings have been or are to be commenced in foreign jurisdictions. In this regard, we will be examining the Grand Court Law and Rules against the background of the UK Civil Jurisdiction and Judgments Act 1982 to determine whether any principles can be usefully adopted for Cayman purposes.
>
> We intend to further discuss our findings at the next scheduled meeting of the Commission. At that time we will confirm the way forward.'

> In circumstances where a number of the issues raised in this matter are the subject of active consideration by the Law Reform Commission it is, in my opinion, inappropriate for a first instance judge to consider extending the current state of the law, the more so when the same is clearly set out by the Court of Appeal.
>
> For the reasons set out above, I consider that I have no jurisdiction to make the orders sought."

34. I have set out the judge's reasoning at length lest it be thought that, in reaching a different conclusion on the question which he needed to address, I have overlooked some step in that reasoning. The judge, after setting out the submission made to him on behalf of the claimant, identified that question as "whether *Chabra* relief is available in the Cayman Islands where there is no CAD in the proceedings in the Cayman Islands?". His conclusion - and, in particular, whether he was correct to take the view (expressed in the final sentence of paragraph 6 of his reasons) that *Chabra* relief is not available in the Cayman Islands where there is no CAD in the proceedings in the Cayman Islands - turns, as it seems to me, on his analysis of the judgments in this Court in the two cases to which he refers, *Algosaibi and Brothers Company v Saad Investments Company Limited and*

others (CICA 1 of 2010, unreported, 15 February 2011) ("*Saad*") and *Deloitte & Touche Inc. v Felderhof and others*, (CICA 2 of 2010, unreported, 12 July 2011) ("*Felderhof*"). If the judge was wrong in his analysis of the judgments in *Saad* and *Felderhof,* there is nothing in the other reasons which he gave which can support the conclusion which he reached.

Do the judgments of this Court in Saad and Felderhof support the judge's conclusion that Chabra type relief is not available in the Cayman Islands against an NCAD where there is no CAD in the proceedings in the Cayman Islands

35. In *Saad*, proceedings had been brought in the Cayman Islands by a partnership established in the Kingdom of Saudi Arabia, Ahmad Hamad Algosaibi and Brothers Company, against Maan Al Sanea, Barclays Private Bank and Trust (Cayman) Ltd (as trustee of a settlement) and forty one Cayman Islands registered companies (which Mr Al Sanea was said to own or control in respect of monies in excess of US$5 billion alleged to have been misappropriated. The proceedings were commenced by writ of summons issued on 27 July 2009. The writ was served on the defendant companies at their registered offices. Permission to serve a copy of the writ on Mr Al Sanea out of the jurisdiction was obtained under GCR Order 11 rule 1. At an *ex parte* hearing, shortly before the issue of the writ, worldwide freezing orders were granted over the assets of Mr Al Sanea and the defendant companies. On 18 December 2009, following an *inter partes* hearing, Justice Anderson continued those orders against twenty four of the defendant companies until trial or further order. Twenty two of those companies appealed to the Court of Appeal from that order. Of those twenty two companies, eighteen were NCADs (that is to say, defendants against whom no cause of action was alleged).

36. The NCAD appellants did not challenge the proposition that there was jurisdiction to grant a *Mareva* injunction against an NCAD in a case where such an injunction would be ancillary and incidental to the effective enforcement of a prospective judgment against a defendant against whom there was a pleaded cause of action (a CAD) in circumstances where the assets of the NCAD – that is to say, assets to which the NCAD was itself entitled beneficially (as well as assets in which the CAD had a beneficial interest) - might become available to satisfy a judgment against the CAD: see paragraph 22 of my judgment in this Court. This Court expressed the view that the NCAD appellants were right to accept that proposition; for the reasons which are set out in paragraphs 23 to 25 of my judgment. But the Court did not need to consider whether it was *necessary* that the

prospective judgment debtor was himself, or itself, a defendant to the proceedings in this jurisdiction; and it did not do so. The issue did not arise because, on any view, there were CADs – Mr Al Sanea and a number of the other defendant companies – against whom substantive relief was sought in the proceedings. My observation, at paragraph 80, that Justice Anderson had erred in principle in continuing the *Mareva* relief against defendants in respect of whom it could not be said that, following a judgment against another defendant (against whom the claimant did have a good cause of action) there was reason to suppose that the claimant would be able to invoke some process of enforcement which would lead to the assets (if any) of the non-cause-of-action NCAD becoming available to satisfy that judgment, must be read in that context. I was not addressing the question whether *Mareva* relief could be granted against an NCAD in circumstances where the judgment in satisfaction of which the assets of the NCAD might become available by some process of enforcement was not a judgment in the proceedings before the Cayman Islands courts. If my observations are read it context, it can be seen that I was addressing the issues set out under sub-paragraphs (A) and (B) of paragraph 80: that is to say, whether, on the facts in that case, it could be said (i) that the claimant would be able to invoke some process of enforcement which would lead assets of the NCAD becoming available to satisfy a judgment against the CAD, and (ii) that there was reason to suppose that the NCAD had (or would or might in the future have) assets which were at risk of dissipation. *Saad* provides no support for the conclusion that the answer to the question whether *Mareva* relief could be granted against an NCAD in circumstances where the judgment in satisfaction of which the assets of the NCAD might become available by some process of enforcement was not a judgment in the proceedings before the Cayman Islands courts should be "No".

37. In *Felderhof*, proceedings had been brought by Deloitte & Touche Inc, as trustee of the estate of Bre-X Minerals Ltd, a Canadian company in bankruptcy, against John Felderhof, his former wife, Ingrid Felderhof, Spartacus Corp, a company incorporated in the Cayman Islands, and Bank of Butterfield International (Cayman) Limited. The proceedings had been commenced in December 1997. On 18 December 1997, immediately before the issue of the writ, the claimant obtained, *ex parte*, worldwide freezing orders restraining Mr and Mrs Felderhof and Spartacus Corp from dealing with or diminishing the value of their assets up to a value of CN$ 5 billion.

38. The writ, which was served on each of the defendants within the jurisdiction of the Cayman Islands courts, was endorsed with claims against Mr Felderhof for breach of fiduciary duty and negligence in his capacity as director, general manager and chief administrative officer of Bre-X. No cause of action was pleaded against Mrs Felderhof; but it was alleged (i) that she owned real estate in the Cayman Islands as nominee or bare trustee for Mr Felderhof and (ii) that assets in her name would be available to satisfy any judgment obtained by the claimant against Mr Felderhof.

39. On 2 May 2003 the action was stayed, by consent, pending the outcome of proceedings in Canada. The stay was granted on the basis that the allegations against Mr Felderhof would be pursued in the proceedings in Canada; and that the proceedings in the Cayman Islands would not be pursued "except in so far as it might be necessary for enforcement or collection purposes." On 30 June 2009 Mrs Felderhof and Spartacus Corp sought orders setting aside the freezing orders of 18 December 1997 and discharging the stay.

40. The applications came before Justice Henderson in December 2009. On appeal from his order dismissing the applications, this Court addressed (amongst other issues) the question whether there was a sufficient basis for the exercise of the so-called *Chabra* jurisdiction against the non-cause of action defendants, Mrs Felderhof and Spartacus. It was submitted on their behalf that the *Chabra* jurisdiction did not extend, in this jurisdiction, to the grant of a freezing injunction "in aid of a proceeding in a foreign court" in circumstances where (a) the cause of action pleaded in the foreign jurisdiction was not justiciable in this jurisdiction and (b) "the person whose assets are to be frozen is not a party defendant in the foreign jurisdiction". This Court rejected the qualifications which that submission sought to introduce for the reasons set out in my judgment at paragraphs 43 to 45. At paragraph 44 I observed, in the context of the qualification sought to be introduced by sub-paragraph (a), that the real question was not whether the cause of action pleaded in the Ontario proceedings would be justiciable here: "the real question is whether a judgment against Mr Felderhof in the Ontario proceedings could be enforced against him in the Cayman Islands". In the circumstances that proceedings had been commenced against him in the Cayman Islands, at a time when he was amenable to the jurisdiction of these courts, which raised substantially the same issues as those raised in the Ontario proceedings, there was, I said, at the least a good arguable case that a judgment against him in the Ontario proceedings would be enforceable here. At

paragraph 46, in the context of the qualification sought to be introduced by sub-paragraph (b), I said this:

> "The purpose of the *Chabra* jurisdiction is to ensure that enforcement of a future judgment of the court against a cause-of-action defendant is not frustrated by the dissipation of assets (in the hands of the non-cause-of-action defendant) which would or might otherwise be or become available to satisfy that judgment. The principle was explained by the High Court of Australia in *Cardile v Led Builders Pty Ltd* [1999] HCA 18; 198 CLR 380; 162 ALR 294; 73 ALJR 657 at paragraph 57:
>
> > "What then is the principle to guide the courts in determining whether to grant *Mareva* relief in a case such as the present where the activities of third parties are the object sought to be restrained? In our opinion such an order may, and we emphasise the word 'may', be appropriate, assuming the existence of other relevant criteria and discretionary factors, in circumstances in which:
> >
> > i. the third party holds, is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets, including 'claims and expectancies', of the judgment debtor or potential judgment debtor; or
> >
> > ii. some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor."
>
> There is nothing in that statement of principle to suggest that the question whether or not the third party is party to the substantive proceedings against the potential judgment debtor is of any relevance in relation to either the first or the second limb under which the jurisdiction may be exercised."

My observation, at paragraph 46, that the purpose of the *Chabra* jurisdiction is to ensure that enforcement of a future judgment of the court against a cause-of-action defendant is not frustrated by the dissipation of assets (in the hands of the non-cause-of-action defendant) which would or might otherwise be or become available to satisfy that judgment must, again, be read in context. Mr Felderhof was a defendant to the Cayman Islands proceedings who had been served with the writ; notwithstanding that the claimant was not pursuing those proceedings against him in this jurisdiction. I was not addressing the question whether *Mareva* relief could be granted against an NCAD in circumstances

where no judgment against the CAD - in satisfaction of which the assets of the NCAD might become available by some process of enforcement – could be obtained in the proceedings before the Cayman Islands courts. *Felderhof* provides no support for the conclusion that the answer to that question should be "No". Indeed, it provides some support for the opposite conclusion; given that, although Mr Felderhof was a party to the proceedings before the Cayman Islands courts, the claim against him was not being pursued in those proceedings at the relevant time.

41. I am satisfied, therefore, that the judge's conclusion - that *Chabra* relief is not available in the Cayman Islands where there is no CAD in the proceedings in the Cayman Islands – is not supported by the reasons which he gave.

Was the judge correct, nevertheless, to conclude that Chabra type relief is not available in the Cayman Islands against an NCAD where there is no CAD in the proceedings in the Cayman Islands

42. It is necessary to go on to consider whether the judge reached the correct conclusion; albeit not for the reasons which he gave.

43. A convenient starting point for that consideration can be found in the speech of Lord Browne-Wilkinson in *Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd* [1993] AC 334, 341 C-E:

> "I add a few words of my own on the submission that the decision of this House in *Siskina (Owners of cargo lately landed on board) v Distos Compania Naviera S.A.* [1979] AC 210 would preclude the grant of any injunction under section 37(1) of the Supreme Court Act 1981, even if such an injunction were otherwise appropriate. If correct, that submission would have the effect of severely curtailing the powers of the English Courts to act in aid, not only of foreign arbitrations, but also of foreign courts. Given the international character of much contemporary litigation and the need to promote mutual assistance between the courts of the various jurisdictions which such litigation straddles, it would be a serious matter if the English courts were unable to grant interlocutory relief in cases where the substantive trial and the ultimate decision of the case might ultimately take place in a court outside England."

Lord Keith of Kinkel (*ibid*, 340G) and Lord Goff of Chieveley (*ibid*, 340H) expressed agreement with those observations. I have in mind that, in addressing a submission that passages in Lord Diplock's speech in the *Siskina* (1979] AC 201, 254, 256) imposed a (third) requirement "that the interlocutory injunction must be ancillary to a claim for

substantive relief to be granted in this country by an English court", Lord Browne-Wilkinson went on to say this (*ibid,* 343 C-D):

> "I therefore reach the conclusion that the *Siskina* does not impose the third limit to the power to grant interlocutory injunctions which the respondents contend for. Even applying the test laid down by the *Siskina* the court has power to grant interlocutory relief based on a cause of action recognized by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court or arbitral body."

But those observations were made in the context that the interlocutory injunction was sought against a cause of action defendant. In that context, it is readily understandable that Lord Browne-Wilkinson should refer to "a cause of action recognised by English law against a defendant duly served". It is not in dispute that the court cannot grant an injunction against a party who is not properly before it: that is to say, against a defendant who has not been duly served. But it is clear, as it seems to me, that if Lord Browne-Wilkinson had had in mind a case where the interlocutory injunction was sought against a non-cause-of-action defendant, duly served within the jurisdiction (which, given that the *Chabra*–type jurisdiction, established in *SCF v Masri* [1985] 1 WLR 876, had, by the time of the decision in the *Channel Tunnel* appeal, received little attention in the courts, may be considered unlikely), he would not have thought it any bar to the grant of a *Chabra* type injunction against that NCAD that the cause of action against the CAD (being a cause of action recognised by English law) was being pursued in a foreign court (or before an arbitral body) in circumstances where the CAD had not been served in the English proceedings. Given what he had said about "the international character of much contemporary litigation and the need to promote mutual assistance between the courts of the various jurisdictions which such litigation straddles", it is impossible, in my view, to think otherwise.

44. *Cardile and others v Led Builders Pty Ltd* [1999] HCA 18 was before the High Court of Australia some six years later. In reviewing the powers of the Federal Court to grant freezing orders, the majority of the Court (Justices Gaudron, McHugh, Gunmow and Callinan JJ) approved the observations of Justice Brennan in *Jackson v Sterling Industries Ltd* (19870 162 CLR 612, 621:

> "A judicial power to make an interlocutory order in the nature of a *Mareva* injunction may be exercised according to the exigencies of the case and, the schemes that a debtor may devise for divesting himself of assets being legion, novelty of form is no objection to the validity of such an order.

> The general principle which informs the exercise of the power to grant interlocutory relief is that the court may make such orders, at least against parties to the proceeding against whom final relief may be granted, as are needed to ensure the effective exercise of the jurisdiction invoked. The Federal Court had jurisdiction to make interlocutory orders to prevent frustration of its process in the present proceeding."

and went on to say this (*ibid,* [42]):

> "Subject to two matters to which we shall come, this passage should be accepted as a correct statement of principle. The first matter is that, in that passage, the attention of the Court was directed to orders against parties to the proceedings and against whom final relief was sought. In that situation, the focus is the frustration of the court's process. If relief is sought against non-parties, the focus must be the administration of justice. The second matter is that, to avoid confusion as to its doctrinal basis, it is preferable that references to "*Mareva* orders" be substituted for "injunctions".

The same point is made in a later passage of the majority judgment (*ibid,* [50]] where it is said:

> ". . . There are significant differences between an order protective of the court's process set in train against a party to an action, including the efficacy of execution available to a judgment creditor, and an order extending to the property of persons who are not parties and who cannot be shown to have frustrated, actually or prospectively, the administration of justice."

The distinction between a focus on the "frustration of the court's process" (in a case where *Mareva* relief is sought against a party against whom final relief is sought in the action – a CAD) and a focus on "the administration of justice" in a case where relief is sought against "non-parties" – NCADs) is, I think, of importance. It points to the conclusion that *Mareva* relief may be granted against an NCAD in proceedings to which the person against whom final relief is sought (the CAD) is not a party; provided, always, that the administration of justice so requires.

45. In *C Inc v L* [2001] 2 Lloyd's Rep 459, 472, [60], Mr Justice Aikens said this, after examining the speech of Lord Browne-Wilkinson in the *Channel Tunnel* case:

> ". . . the grant of an interlocutory injunction will depend upon three tests being fulfilled: (i) does the English Court recognize the cause of action that is to be the subject of the final order (wherever that is made); (ii) can the respondent to the interlocutory injunction be 'duly served' with the English Court proceedings for an interlocutory injunction; and (iii) is the injunction 'ancillary' to the final order sought (or - presumably – already obtained) in the English Court or elsewhere . . . .".

There is nothing in those three tests which suggests that the person against whom the final order is, prospectively, to be obtained – or has been obtained – needs to be a party to the proceedings in which the injunction (if not sought against that person) is sought. Confirmation that Mr Justice Aikens did not regard that as a necessary requirement is found in a later paragraph of his judgment (paragraph 75: "Conclusions on the Court's legal power to grant freezing orders over the assets of a non-party against whom there is no claim to substantive relief") where, after considering other decisions, including that of the High Court of Australia in the *Cardile* case, he said this (so far as material in the present context):

> ". . . (3) Unless it is a case under s.25 of the CJJA 1982, a freezing order cannot be entirely 'free-standing'. It has always to be incidental to and dependent upon a claim to enforce a substantive right. That substantive right has to be one which the English Court will recognize. But the claim to enforce that right does not have to be made in the English Court. (4) If the claim for substantive relief is not made in the English Court, then the English Court will only have the power to grant a freezing order if the respondent to the order can be made subject to the territorial jurisdiction of the English Court. (5) If there is a claim for substantive relief by A against B (whether or not in the English Court) . . . then the English Court can grant a freezing order against the assets of C . . .".

46. More recently, reference was made to Lord Browne-Wilkinson's speech in the *Channel Tunnel case* in *Fourie v Le Roux and others* [2007] UKHL 1, [2007] 1 WLR 320. At paragraph [29] (*ibid,* 332 *E-H*) Lord Scott of Foscote said this:

> ". . . in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, the House rejected the proposition that an English court can never grant an interlocutory injunction where the cause of action is being litigated in arbitration proceedings abroad: see per Lord Mustill, at pp 361-362. Lord Browne-Wilkinson said, at p 342:
>
> > 'Although the respondents have been validly served (i.e. there is jurisdiction in the court) and there is an alleged invasion of the appellants' contractual rights (i.e. there is a cause of action in English law), since the final relief (if any) will be granted by the arbitrators and not by the English court, the English court, it is said, has no power to grant the interlocutory injunction. In my judgment that submission is not well founded.'
>
> And he concluded, at p343, that:
>
> > "the court has power to grant interlocutory relief based on a cause of action recognized by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court or arbitral body."

Lord Scott went on (*ibid,* [30]) to say this:

> "My Lords, these authorities show, in my opinion, that, provided the court has in personam jurisdiction over the person against whom an injunction, whether interlocutory or final, is sought, the court has jurisdiction, in the strict sense, to grant it. . . ."

47. The conclusions which I draw from this examination of the authorities may be summarized as follows: (i) that the person against whom the Mareva order is sought must be subject to the jurisdiction of the court; (ii) that, in a case where there is no cause of action alleged against the person against whom the order is sought (that is to say, where the claimant seeks to invoke the Chabra jurisdiction against an NCAD), it is not necessary that the substantive claim against the cause-of-action defendant has been brought (or is being pursued) in the court in which the Mareva order is sought; (iii) that the substantive claim against the CAD (wherever brought or pursued) must be founded on a cause of action recognized by the court in which the Mareva order is sought; and (iv) that, if those requirements are met, there is no reason in principle why the CAD should himself (or itself) be a party to the proceedings in which the Mareva order is sought against the NCAD; nor that (if not a party to those proceedings) the CAD should, nevertheless be subject to the jurisdiction of the court seized of those proceedings.

48. It follows that I would hold that the judge was wrong to conclude that *Chabra* type relief is not available in the Cayman Islands against an NCAD where there is no CAD in the proceedings in the Cayman Islands.

Should a freezing order be made against the respondent; or should they now be discharged from the undertakings given on their behalf on 14 February 2012

49. Having reached that conclusion, I must go on to consider whether, in the circumstances as they now are, a freezing order should be granted against the two Cayman Islands companies (as VTB Capital submits by its appeal); or whether they should be discharged from the undertakings given on their behalf on 14 February 2012.

50. As I have said, in the circumstances that the Court of Appeal of England and Wales upheld the decision of Mr Justice Arnold to set aside service of the writ in the English Proceedings, it did not find it necessary to address the question whether it would have been appropriate to continue the worldwide freezing order. The Court did, however, observe, at paragraphs 172 and 173 of its judgment, that:

> "172 If the question had arisen, it would have been on the footing that VTB has a seriously arguable case for saying that Mr Malofeev had been engaged in a major fraud against VTB, by which VTB was persuaded to lend RAP $220 million to fund what was represented as a sale of assets worth considerably more than that amount, whereas in fact, first, the assets were worth a great deal less, and secondly the transaction was not a true sale, and moreover a substantial part of the proceeds of the loan (it can be assumed) disappeared into the complex web of corporate entities in various jurisdictions, including several offshore, for the benefit of Mr Malofeev, and may be for that of others involved. Furthermore, not only was the use of that web of corporate entities a significant part of the means whereby the fraud was committed, by concealing the true ownership of RAP, but it would also make it difficult for VTB to enforce any judgment that it was able to obtain. All that is made out, . .
>
> 173 It seems to us that those propositions would have provided a strong starting point for a case in favour of a WFO. It could be inferred that a wealthy individual who uses such methods to defraud a bank in this way and on this scale might readily resort to similar methods to render his major assets proof against enforcement in response to proceedings being taken against him, at any rate if he had reason to fear that the proceedings might be pursued effectively."

And, at paragraph 175 of its judgment, the Court went on to say this:

> "175. Given that there is (as the judge held) a good arguable case against Mr Malofeev on an allegation of fraudulent misrepresentation used to procure a loan of $220 million against wholly inadequate (and itself misrepresented) security, on the part of a businessman with international connections and assets, using offshore companies in many parts of the world, it might not be difficult to suppose that, if Mr Malofeev thought he was at risk of having his assets seized to satisfy a judgment against him, he would dispose of those assets, or move them into a situation in which it would be difficult or impossible for the claimant to reach them."

51. The Court then went on to consider the observations of Lord Justice Peter Gibson in *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272; and two earlier decisions of the Court of Appeal, *Norwich Union v Eden* (25 January 1996, unreported) and *Grupo Torres SA v Al Sabah* (21 March 1997, unreported) – neither of which were cited in *Thane Investments* – and the analysis of those decisions by Mr Justice Flaux in *Madoff Securities International Limited and others v Raven and others* [2011] EWHC 3102 (Comm), with which it expressed agreement (at paragraph 178 of its judgment). It said this (*ibid*):

> "178. . . . On that basis it seems to us that it would have been right for the judge to take into account a finding of good arguable case that Mr Malofeev had been engaged in a major fraud, and that he operated a

> complex web of companies in a number of jurisdictions, which enabled him to commit the fraud and would make it difficult for any judgment to be enforced. We would regard such factors as providing powerful support for the case of a risk of dissipation.
>
> 179. As it is, however the question of continuing the WFO beyond the decision on this appeal does not arise, and we say no more about how we would have regarded the various points argued before us, or what our final decision would have been on this point if we had held otherwise on the issue of service out of the jurisdiction as regards the tort claims."

52. Nevertheless, as I sought to explain in my judgment in *Saad* (at paragraph 32), the court needs to be satisfied of two matters before granting *Mareva* relief. First, that there is good reason to suppose that the assets in relation to which a freezing order is imposed would become available to satisfy the judgment which the claimant seeks; and, second, that there is good reason to suppose that, absent such relief, there is a real risk that those assets will be dissipated or otherwise put beyond the reach of the claimant. It is not enough that, absent a *Mareva* order there is a real risk that the assets will be put beyond the reach of the claimant: it is necessary, also, that the court be satisfied that there is good reason to suppose either (i) that the CAD can be compelled (through some process of enforcement) to cause the assets held by the NCAD to be used to satisfy the judgment which the claimant seeks or (ii) that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD.

53. The basis upon which it was submitted that there is good reason to suppose that the assets of Universal Telecome Investment Strategies Fund (the Fund) could become available to satisfy the judgment which the claimant sought against Mr Malofeev in the English Proceedings may be summarised as follows:

    (1) It is said that the Rostelecom shares (to which the claimant seeks to have recourse) are held as assets of the Fund. There are two classes of shares in the Fund, Management Shares and Participating Shares. Only the Participating Shares carry any economic interest in the Fund. Mr Malofeev is the ultimate owner of all the Participating Shares, through his interest in Tarsara Portfolio Corporation ("Tarsara"), a company incorporated in the British Virgin Islands. Universal Telecom Management holds all the Management Shares in the Fund.

    (2) It is said that the claimant would be able to enforce a judgment against Mr Malofeev in the English Proceedings by taking control of Tarsara in the

British Virgin Islands – if necessary by obtaining the appointment of a receiver in that jurisdiction - and then, through Tarsara (by its receiver), realising the value of the Participating Shares in the Fund, by serving notice to redeem those shares.

(3) It is said that, in the event that the Fund failed or refused to redeem the Participating Shares, proceedings could be brought in this jurisdiction by Tarsara (by its receiver) to compel it to do so; alternatively Tarsara could seek an order for the winding up of the Fund.

54. This Court was not persuaded, at the conclusion of the oral hearing of the appeal, that the claimant had established that there was any real prospect that Mr Malofeev could be compelled to cause the assets of the Fund to be used to satisfy the judgment which it sought in the English Proceedings; and was of the view that there was very real doubt that the claimant could obtain recourse to those assets by some other (indirect) process of enforcement. In particular, the Court could find little, if any, evidence that a court in the British Virgin Islands would be persuaded to appoint a receiver over Tarsara. It was in those circumstances that the Court decided not to continue the *Mareva* order until the delivery of its written judgments.

55. The Court's doubts have been confirmed by events. On 27 March 2013, following the decision of the Supreme Court of the United Kingdom to dismiss the appeal from the order of the Court of Appeal upholding the decision to set aside permission to serve the writ in the English Proceedings, Justice Bannister – sitting in the Eastern Caribbean Court in the British Virgin Islands – discharged the *Mareva* order which had been made by that court on 24 August 2011 (and continued on 21 September 2011). The circumstances in which he did so are described in the judgment which he delivered. After referring to the judgments of the Supreme Court which had been handed down on 6 February 2013, he said this:

> "On 6 February 2013 the Bank applied here to lift the stay on the BVI proceedings and to vary the BVI freezing order so as (1) to continue it until the trial of the BVI proceedings and (2) to include additional assets ('the Tarsara assets'). Those applications were set down be heard on 28 May 2013. On 15 February 2013 Mr Malofeev applied here for the discharge of the BVI freezing order. On 6 March 2013 the Bank issued an application asking (1) for Mr Malofeev's discharge application to come on with the Bank's application for freezing relief on 28 May 2013 or in the alternative (2) for the grant of interim freezing relief between

> the date of Mr Malofeev's discharge hearing (20 March 2013) and 28 May 2013, when the Bank's application to lift the stay and to continue the injunction is due to be heard over two days."

As the judge explained, he had to decide (i) whether to adjourn Mr Malofeev's discharge application; if not, (ii) whether to discharge the "historical" BVI injunction; and, if so, (iii) whether to grant interim freezing relief to the Bank until 28 May 2013. He refused to adjourn Mr Malofeev's application; and he discharged the existing *Mareva* Order. He did so for the reasons set out in paragraph 5 of his judgment:

> "The proceedings in support of which the BVI injunction was granted and continued having come to an end, it seems obvious to me that there can be no justification for keeping it on foot. Mr Malofeev has an absolute right to have it discharged. There is no good reason for making him wait until 28 May 2013, or any other date to have his application dealt with, nor be there any good reason for refusing to discharge the freezing order. . . . an injunction granted in aid of foreign proceedings must fall away as of right when such proceedings become abortive. The reason for this is that the juridical basis for the grant of an injunction and, with it, the Court's reason for granting it has fallen away. . ."

The judge refused to grant interim relief in the form of a *Mareva* order until trial. He was content to assume (as he said at paragraph 7 of his judgment) that the BVI proceedings might be "capable of galvanization back into life"; and he accepted (at paragraph 9) that the evidence established a real risk of dissipation. He pointed out that there were no active proceedings before him "and it is uncertain whether there ever will be". He observed that he had been shown no authority to support the view that "where there are no foreign proceedings in aid of which the making of a freezing order can be considered and where there are no domestic proceedings on foot . . . the Court may grant freezing relief, as it were in a vacuum". And he went on to say this (at paragraph 13):

> "It may be that, as a matter of pure jurisdiction, the Court has power to make such an order, but in my judgment it is contrary to established principle for the Court to act in such a way. Such an order must, in my judgment, be made, if at all, in support of a right which is presently being asserted in some jurisdiction. In this case, the Bank is presently asserting no right anywhere."

56. I respectfully agree with those observations. I accept – for the reasons set out earlier in this judgment – that the English Proceedings cannot be said to have been finally determined. I accept, also, that (as Justice Bannister put it) the BVI proceedings may be "capable of galvanization back into life". But, as things stand, there are no current proceedings in which the Bank is pursuing substantive relief against Mr Malofeev; and no basis on which it could be said that there are good grounds to suppose that the Fund's

assets would become available to satisfy any judgment the Bank might obtain against him in any proceedings which may be in contemplation.

Conclusion

57. For those reasons I would decline to make the orders sought on this appeal. Although I am satisfied that the judge was wrong to take the view that he did not have jurisdiction to make the *Mareva* order sought, I am satisfied that, in the events which have happened, no such order should be made. I would discharge the respondents from the undertakings given on their behalf on 14 February 2012.

Elliott Mottley, Justice of Appeal

58. I agree

Sir Anthony Campbell, Justice of Appeal

59. I also agree.