Transforming a Black Swan into a Phoenix: the British Virgin Islands' Solution to Standalone Injunctive Relief

Julie Engwirda and Jonathan Addo*

The freezing order, or Mareva injunction, is a powerful tool to combat fraud and dishonest conduct. Since its creation in 1975,[1] the ownership of assets and wealth structuring has become increasingly complex. Rarely will one find the assets, the underlying cause of action and the location of relevant individuals all in one jurisdiction. For example, if the court with primary jurisdiction is England, it is possible that the assets will be located in another jurisdiction, perhaps Hong Kong, and legally owned by a corporate entity or trust structure based in yet another jurisdiction, say the British Virgin Islands (BVI). These competing jurisdictional ties exist even before one analyses other elements of control exercised over such assets.

The complexities are generally magnified where fraud is involved. England has had to grapple with this issue from the perspective that few fraudsters hold their assets in or via structures centred in England; while it

* Julie Engwirda is a partner in Harneys' Litigation, Restructuring and Insolvency practice group in Hong Kong. Julie has a wealth of experience in complex cross-border litigation and is particularly sought after by clients for her work in insolvency, distressed funds, shareholder disputes, and claims arising from fraud. Jonathan Addo is a partner in Harneys' Litigation and Insolvency practice group in the British Virgin Islands. He specialises in shareholder disputes, commercial fraud, asset tracing and directors' duties, advising major corporations and investors on complex commercial litigation. He has particular expertise in complex hedge fund-related litigation.

1 First granted in *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093 and shortly thereafter in *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509, where the English Court of Appeal confirmed the jurisdiction to make such orders.

may have substantive jurisdiction over any dispute, it may not be the most effective jurisdiction for interim relief. Offshore financial centres, such as the Cayman Islands or the BVI, typically face the situation from a different perspective, where the substantive dispute is commenced in a foreign jurisdiction and the relevant entity holding the assets is incorporated in the offshore financial centre.

Courts must be equipped to respond effectively and swiftly to these scenarios. To limit the availability of a freezing order to where the same jurisdiction deals with both the underlying cause of action and interim relief, or where the same jurisdiction *could but is not* exercising jurisdiction over the substantive claim as well as the interim relief, is to ignore the realities of the commercial context in which the freezing order jurisdiction has evolved and now operates.

To its credit, the common law world has demonstrated a keen appetite to develop the jurisdiction underpinning the grant of freezing orders to meet the increasing sophistication of international fraud and money laundering.[2] The relief available today is no longer recognisable as the fledgling jurisdiction considered in *The Siskina*[3] or even in *Mercedes Benz v Leiduck*.[4] It has been and continues to be fine-tuned to the demands of the day. The BVI, which is generally considered a progressive jurisdiction, confirmed through common law the power to grant standalone freezing orders in the well-known and well-regarded 2010 decision of *Black Swan*.[5]

Clipping the *Swan*'s wings

Not all common law developments are welcome. In 2020, two decisions from the Eastern Caribbean Supreme Court, Court of Appeal – commonly referred to as *Broad Idea 1*[6] and *Broad Idea 2*[7] after the name of the non-cause of action defendant (NCAD) company – overturned the *Black Swan* jurisdiction and held that the Court's jurisdiction under the relevant legislation[8] did not extend to granting freezing orders against an NCAD.

2 Lord Neuberger's Foreword, Steven Gee, *Commercial Injunctions* (6th edition, Sweet & Maxwell, 2016), xiii–xv.

3 *Siskina (Owners of Cargo Lately Laden on Board) v Distos Compania Naviera SA* [1979] AC 210 (*The Siskina*).

4 [1996] 1 AC 284 (*Mercedes Benz*).

5 Named after *Black Swan Investment ISA v Harvest View Ltd* BVIHCV 399/2009 (*Black Swan* and the *Black Swan* jurisdiction).

6 *Convoy Collateral Ltd v Broad Idea International Limited* BVIHCMAP 30/2016 (30 March 2020) (*Broad Idea 1*).

7 *Broad Idea International Limited v Convoy Collateral Limited* BVIHCMAP 26/2019 (29 May 2020) (*Broad Idea 2*).

8 Section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act (BVI Act).

In *Broad Idea*, the NCAD was a BVI company subject to the jurisdiction of the BVI courts. A freezing order had been granted by the BVI Commercial Court in aid of substantive proceedings brought in Hong Kong against a director and substantial shareholder of the BVI company (the cause of action defendant or CAD). The director is a principal defendant in proceedings in Hong Kong and alleged to be an integral player in the Enigma network.[9] Following the reasoning in *Mercedes Benz*, the Court of Appeal held in *Broad Idea 1* that a standalone Mareva injunction did not come within the scope of the service-out gateways under the civil procedure rules of the BVI. As a result, the Court set aside the order for service of the standalone freezing order out of the jurisdiction[10] on the CAD, as he was not subject to the Court's *in personam* jurisdiction.

The combined effect of the decisions in *Broad Idea 1* and *Broad Idea 2* was immediate. The BVI was divested of its jurisdiction to provide interim relief in support of foreign proceedings with the real risk that alleged fraudsters could hold their assets within the BVI with relative impunity, irrespective of whether the legal and/or beneficial owner of the assets was within the BVI jurisdiction. The BVI suddenly found itself in the 'black hole' described by Lord Nicholls in *Mercedes Benz*.[11]

In deciding *Black Swan,* Bannister J closely examined and considered the common law developments following *The Siskina*, including the majority decision in *Mercedes Benz*. The *Black Swan* decision resulted in the BVI remaining at the forefront of judicial development and in step with other key jurisdictions, recognising its importance as an offshore financial centre.

While the BVI may be applauded for taking swift steps to introduce legislation to address the perceived lacuna[12] left by the *Broad Idea* decisions, no amount of statutory patchwork can address the root cause of the issue. The case law that was relied upon by the Court of Appeal in reaching its decision is in desperate need of revamp.

The *Broad Idea* decisions were appealed to the Privy Council with a hearing in February 2021.[13] The decision is pending. The importance of the issues under consideration cannot be exaggerated, and the decision is likely to impact how all common law courts approach the grant of

9 The Enigma Network fraud is the biggest case of alleged market malfeasance in the history of Hong Kong. The Appellant is allegedly one of its largest victims.

10 The 'injunction gateway' under Eastern Caribbean Supreme Court Civil Procedure Rules (CPR), rule 7.3(2)(b).

11 [1996] AC 284, 305B.

12 The BVI Act was amended on 7 January 2021 introducing a statutory footing for standalone injunctive relief.

13 JCPC 2020/0043 and JCPC 2020/0073.

standalone freezing orders. The primary issues pending determination by the Privy Council are:

- whether there is a common law power in the BVI to grant standalone freezing orders[14] in aid of foreign proceedings (the power issue); and
- if so, is it possible to serve out of the jurisdiction a standalone freezing order under the CPR (the territorial issue)?

The two issues go hand in hand, but this article will focus primarily on the power issue.

In *Broad Idea 2*, it is respectfully suggested that the Court of Appeal erred in three main areas when considering the power issue. First, the court wrongly held that, as a result of *stare decisis,* it was bound by the Privy Council decision in *Mercedes Benz*.[15] Secondly, it held that the *Black Swan* decision had not previously come up for consideration by the Court of Appeal so it was open to it to consider the merits of *Black Swan*.[16] Thirdly, the Court of Appeal did not properly consider how the law on freezing orders has evolved since *Mercedes Benz* and the cases upon which *Mercedes Benz* relied. The latter point proves the devil is in the detail.

The Court of Appeal's reasoning in *Broad Idea* was to treat judicial *dicta* from cases such as *The Siskina* as delineating the statutory limit of the jurisdiction to grant freezing order relief, leading it to fetter the ambit of its power from the perspective of an exercise in statutory construction. On this basis, the Court of Appeal erred in holding that the court had no jurisdiction to grant an interlocutory injunction under the relevant BVI legislation in the absence of a cause of action against a defendant duly served in the BVI.[17]

14 The reference to 'standalone' freezing orders is a useful shorthand but must not disguise the fact that such orders are not standalone, given they will always be granted in aid of ongoing substantive proceedings (or soon to be) in another jurisdiction. The language simply reflects that there is no need for those substantive proceedings to take place in the same jurisdiction which grants the freezing order relief.

15 The Court of Appeal easily recognised the difficulties as 'there is a lack of uniformity in the decisions interpreting the binding effect of decisions of the Privy Council' but then appears to have taken the easy way out finding it was bound by the majority in *Mercedes Benz*, thereby failing to recognise that not even Hong Kong, where the judgment originated from, had departed from it.

16 The merits of *Black Swan* had come before the Court of Appeal on two occasions and on both occasions had been endorsed by the Court of Appeal: *Yukos CIS Investments Limited v Yukos Hydrocarbons Investments Limited* HCVAP 28/2010 (*Yukos v Yukos Hydrocarbons*); and *Tsoi Tin v Tan Haihong* BVIHCMAP 23/2013, where Peirera CJ of the BVI Court of Appeal held at [12] that freezing orders should be equated with *Norwich Pharmacal* orders and anti-suit injunctions as not requiring a pre-existing cause of action.

17 Relying on the words '… in all cases' found in s24 of the BVI Act despite these words being given no special meaning and clearly not intended to refer to an 'action', 'cause' 'matter', 'proceedings' or 'suit', each of which were defined in the BVI Act but absent from s24.

A ship and a car go into a bar… and come out a Black Swan

At the heart of both *Broad Idea* appeals is a challenge to the fundamental reasoning employed in *The Siskina* and by the majority in *Mercedes Benz*. The *ratio* of both *The Siskina* and *Mercedes Benz*, however, was solely concerned with the territorial issue. Their Lordships in both cases determined that it was not possible to serve a standalone freezing order out of the jurisdiction where granted. Having so determined, neither *The Siskina* nor the majority in *Mercedes Benz* went on to consider the power issue, which was discussed by Lord Nicholls in his dissenting judgment in *Mercedes Benz*. Lord Nicholls' discussion of the power issue found favour with Bannister J in *Black Swan*.

When Lord Diplock was considering the freezing order in *The Siskina* in 1979, when the freezing order was in its infancy, there was an understandable lack of appreciation as to how it might develop. Lord Diplock wrongly assimilated the freezing order with the established *American Cyanamid* injunction,[18] thereby tying the availability in England of the freezing order to the existence of the underlying cause of action in England.

In *Mercedes Benz*,[19] Lord Mustill recognised the importance of a proper understanding of the nature of freezing orders, and that they differed from *American Cyanamid* injunctions, but overlooked the point when dealing with the territorial issue.[20] Lord Nicholls' judgment in *Mercedes Benz* not only recognised the need for this understanding but, importantly, went on to analyse it, showing great foresight as to how the jurisdiction was to develop.

In *Broad Idea,* the BVI Court of Appeal reasoned that Lord Nicholls' discussion on the power issue was a dissent from the majority and accorded it no weight. However, as was argued before the Privy Council in the *Broad Idea* conjoined appeals, the majority did not need to determine the power issue and expressly left it open for later consideration.[21] Failing to appreciate that the power issue was not decided by the majority, and while discussed by Lord Nicholls there was no dissent on this issue, the Court of Appeal held in *Broad Idea 2* that it was bound by the majority decision in *Mercedes Benz* (which was premised upon the reasoning of Lord Diplock in *The Siskina*) on the power issue. It was this fundamental misunderstanding that led the Court of Appeal to overturn *Black Swan*. It was also reliance on the majority in *Mercedes Benz* that was determinative of the territorial issue in *Broad Idea 1*.

18 See Lord Diplock's reliance on Cotton LJ's analysis of what would become known as an *American Cyanamid* injunction in *The North London Railway Co v The Great Northern Railway Co* (1883) 11 QBD 30 (*North London Railway*).

19 [1996] AC 284, 299E–F.

20 [1996] AC 284, 299H.

21 *Mercedes Benz,* 304F-305A.

The evolution of the freezing order jurisdiction

To understand where Lord Diplock in *The Siskina* went adrift, and subsequently the BVI Court of Appeal, it is necessary to further explore the origin of the freezing order jurisdiction. Parties are encouraged to resolve disputes peacefully by means of the civil process. If an aggrieved party (C) subjects its claim to that civil process, it must be able to do so without another individual (usually the CAD, but possibly an NCAD) being able to take steps to thwart the enforcement process, should a successful judgment be obtained.

The underlying rationale of the freezing order jurisdiction lies in the protection of the integrity of the enforcement process and the interests/rights of a putative judgment creditor seeking to invoke that process.[22] The recognition of this rationale (1) helps to establish the parameters for the exercise of the power to grant freezing order relief; and (2) is central to rejecting the attempts to assimilate the freezing order jurisdiction with that of the *American Cyanamid* injunction.

A pertinent example of how this rationale demonstrates the true parameters of freezing orders is the willingness of the Supreme Court to extend the type of 'assets' caught by freezing orders: from the traditional, restrictive category of 'legally or beneficially owned' assets, to a more sophisticated approach based on the direct or indirect exercise of 'control' over assets.[23] This modern development helpfully responds to changing aspects of international commerce and enables the freezing order to catch those assets which are no longer 'owned' legally or beneficially by a CAD, but which are held by others or under structures subject to the CAD's control. The driving force is the need to preserve the assets pending an opportunity to enforce against them.

Adopting a rigid approach based on rights arising from a pre-existing cause of action has significantly contributed to the difficulties arising from *The Siskina*. This narrow approach fails to support the flexibility of equitable principles to fashion a remedy in new circumstances not dependent on, or limited by reference to, the existence of a cause of action.

It was the adoption of a rights-based approach that led to the error in *Broad Idea 2*. It is easily done and not without precedent. Lord Diplock

22 See Beatson LJ's 'enforcement principle': *JSC BTA Bank v Ablyazov* [2013] EWCA Civ 928; [2014] 1 WLR 1414 at [34]; cited with approval in the Supreme Court: [2015] UKSC 64; [2015] 1 WLR 4754 at [13]. See also: *JSC BTA Bank v Solodchanko* [2010] EWCA Civ 1436; [2011] 1 WLR 888 per Patten LJ [49(1)], per Longmore LJ [52] and the authorities cited by the Supreme Court on this issue: [2015] 1 WLR 4754 at [23]. Steven Gee, *Commercial Injunctions* (6th edition, Sweet & Maxwell, 2016), at [19-010]-[19-012].

23 *JSC BTA Bank v Ablyazov (No 10)* [2015] 1 WLR 4754.

did so in *The Siskina*, and Lord Mustill and the majority followed suit in *Mercedes Benz*. The Court of Appeal in *Broad Idea 2* held that existing BVI legislation did not empower the Court to grant standalone injunctive relief. Its reasoning was, with respect, founded on a misunderstanding of the underlying legislation and how the legislation sat alongside the common law.

The perplexing fact of the *Broad Idea* appeals was that there did exist a cause of action at the time of the application for the BVI freezing order; the fact it was before the Hong Kong court, rather than the BVI court, is no reason for disqualifying that cause of action. The Court of Appeal held that both the substantive cause of action and the interim relief must be sought in the same jurisdiction, and went on to question whether a judgment in the substantive action in Hong Kong could even lead to enforcement in the BVI against the shares held by the CAD in the NCAD BVI company.

The Court of Appeal approached the BVI Act (and its UK equivalents and predecessors) as though it determined the ambit of the power to grant freezing order relief. It does not. Until the coming into force of the relevant section of the BVI Act, the BVI courts' power to grant an injunction issued from entirely the same jurisdictional basis as the courts of the UK, was based on a historic equitable jurisdiction and subsequently enshrined in statute.

Statute enacted in England gave the High Court the same ability to grant injunctions as had previously existed in both the Chancery and common law courts. The power to grant injunctions is determined in accordance with equitable principles and practice which develop and adapt to meet changing circumstances. While the existence of the power has been confirmed by statute, the *manner, nature and extent of its exercise* do not derive from it.[24] Lord Mustill in *Mercedes Benz* said, in respect of ascertaining what a Mareva injunction does and how, that the enactment of section 37(3) of the Supreme Court Act 1981 'did not, as is sometime said, turn the common law Mareva injunction into a statutory remedy, but it assumed that the remedy existed, and tacitly endorsed its validity.'[25]

The Court of Appeal also rationalised its position by saying that enforcement of any judgment from the Hong Kong proceedings was not available in the BVI. In any event, the Court had no power to grant a freezing order to protect the integrity of the enforcement process unless and until there is an obligation to pay under a judgment. The unattractiveness of this reasoning is readily apparent. The Court of Appeal is not alone in this error, which has led other courts to wrongly assimilate freezing orders with the *American Cyanamid* injunction.

24 *Fourie v Le Roux* [2007] 1 WLR 320 at [25] per Lord Scott.
25 299H.

The purpose and rationale of the *American Cyanamid* injunction is to protect the very rights which are the subject matter of, or arise for determination in, the underlying dispute.[26] Once you overcome the low merits threshold, the court is required to consider whether damages would be an adequate remedy instead of an injunction. This stage reflects the fact that the need for the injunction is tied up with the nature of the rights being asserted in the underlying cause of action. The very talk of damages is premised upon the violation of rights giving rise to a cause of action which in turn may lead to damages.[27] That is why the court takes a closer look at the merits of the underlying dispute when there are concerns about the ability of the putative defendant to pay any such damages[28] or when the granting of the injunction may prove effectively to be final relief.[29]

Given the critical connection between the threatened rights and the role of the interlocutory injunction, the relationship between a cause of action and the ordinary *American Cyanamid* injunction is readily understood.[30] These considerations do not arise for freezing orders, the grant of which focuses not on the rights at stake in the underlying claim, but on the integrity of the enforcement process should that claim become a judgment. This approach was confirmed by the BVI Court of Appeal in *Yukos v Yukos Hydrocarbons*:[31]

> 'The proper question is not whether a freezing injunction is sought "in support of" either a local cause of action or a foreign cause of action which has a local equivalent in any strict sense. Rather, the relevant enquiry is whether or not the claimant may obtain a foreign judgment which may be enforceable by whatever means against local assets owned or controlled by the defendant.'

The freezing order and the *American Cyanamid* injunction have different purposes and different justifications. Seeking to discover the rationale of the freezing order jurisdiction via examination of its relationship with the rights to be determined in the underlying claim is a forlorn and misdirected task. Continuing down this rabbit hole, as the *dicta* in *The Siskina* has encouraged, will blind courts to the true nature of the freezing order jurisdiction and leaves them bereft of criteria to guide its future development.[32]

Defining the 'right' underpinning the freezing order jurisdiction, by reference to procedural justice, merges the rights-based approach with

26 *American Cyanamid* [1975] AC 396, 406.

27 *American Cyanamid* [1975] AC 396, Lord Diplock at 408.

28 See for example, *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* (PC) [2003] UKPC 63; [2003] 1 WLR 2839.

29 See for example, *NWL Ltd v Woods* [1979] 1 WLR 1294, 1306–1307.

30 *North London Railway.*

31 At [147] per Kawaley JA.

32 As Lord Mustill found in *Mercedes Benz*

that of the broader and more flexible protection of the integrity of the enforcement process. It is the combination of the likely conduct threatening to undermine the enforcement process *and* its impact on the interests or rights of C, that triggers the freezing order jurisdiction. This rationale of the freezing order jurisdiction drives a coach and horses through Lord Diplock's restricted approach to freezing orders and his assimilation with the *American Cyanamid* injunction. The straitjacket that *The Siskina* places this jurisdiction in is an anathema to its very rationale:[33]

> 'The jurisdiction to make a freezing order should be exercised in a flexible and adaptable manner so as to be able to deal with new situations and new ways used by sophisticated and wily operators to make themselves immune to the courts' orders or deliberately to thwart the effective enforcement of those orders.'

Lord Diplock approached *The Siskina* without distinguishing the *American Cyanamid* injunction from the freezing order.[34] With the greatest respect, he was wrong not to do so and this led to his limiting the power to grant freezing order relief only on occasions where it could be established there had been a violation of a legal or equitable right giving rise to a claim justiciable in England. Unlike the *American Cyanamid* injunction, the power to grant a freezing order has nothing to do with the violation of such rights.

Lord Diplock, however, did not consider *The Siskina* to be the 'appropriate vehicle' to undertake a consideration of the 'wider question of what restrictions, whether discretional or jurisdictional, there may be upon the powers conferred upon the High Court by [the relevant statute]'.[35] Unfortunately, Lord Diplock's clear statement of the limited ambit of his inquiry appears to have been largely ignored in favour of ascribing almost statutory importance to his famous *dicta*:[36]

> 'A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of

33 See Beatson LJ's 'flexibility principle': *JSC BTA Bank v Ablyazov* [2013] EWCA Civ 928; [2014] 1 WLR 1414 at [36]. This principle must give way to the 'strict construction' principle when applied to interpreting the terms of the Order: [2015] 1 WLR 4754 at [18].

34 *Mercedes Benz v Leiduck* [1996] 1 AC 284, 307H–308A per Lord Nicholls.

35 *The Siskina* at 254 C–D.

36 *The Siskina* at 256C–E.

> the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.'

That this wrong turn took place in 1979, just four years after Lord Diplock had fully examined the ordinary interlocutory injunction in *American Cyanamid*[37] – at the very outset of the creation of the freezing order jurisdiction – is understandable. What is less understandable is the maintenance of this flawed approach once it is recognised that the criteria for an *American Cyanamid* injunction are materially different, and irrelevant, to the criteria applying to a freezing order jurisdiction.

Twenty years on from *The Siskina*, Lord Mustill in *Mercedes Benz* recognised the distinction of the freezing order with the *American Cyanamid* injunction and its relationship with the underlying claim, but wrongly used that as a basis for denying relief rather than embracing that distinction as justification for the standalone freezing order jurisdiction: [38]

> 'An application for Mareva relief decides no rights and calls into existence no process by which the rights will be decided. The decision will take place in the framework of a distinct procedure, the outcome and course of which will be quite unaffected by whether or not Mareva relief has been granted. Again, if the application succeeds the relief granted bears no resemblance to an orthodox interlocutory injunction, which in a provisional and temporary way does seek to enforce rights.'

Lord Mustill left open the possibility of standalone freezing orders if territorial jurisdiction was established.[39] Bannister J in *Black Swan* interpreted Lord Mustill's comments[40] that if territorial jurisdiction was not in issue, Lord Nicholls' view might well prevail.[41]

Time to scuttle the ship: resiling from *The Siskina*

The Siskina survives not by the force and logic of the reasoning it employs, or its suitability or ability to adapt to modern-day international commercial fraud litigation, but by reference to the doctrine of precedent alone. Even that support has waned with every authority that finds yet a further reason to distinguish or depart from the strictures of Lord Diplock's approach. One commentator has suggested that *The Siskina* was listing but had not yet been sunk.[42]

37 [1975] AC 396.

38 *Mercedes Benz v Leiduck* [1996] 1 AC 284, 302 per Lord Mustill.

39 [7].

40 [304F–305A]

41 [7].

42 P Devonshire 'Listing, Not Sunk: *The Siskina* In the House of Lords' (2007) 123 LQR 361. See also P Devonshire, 'Re-examining The Siskina Doctrine: Recent Developments.' (2020) 237 CJQ 237.

With due respect, it is time for *The Siskina* to slip below the water line. That it has not been the focus of a fundamental challenge to date is almost certainly due to the enactment of section 25 of the Civil Jurisdiction and Judgments Act 1982 (CJJA 1982). The Privy Council appeals in *Broad Idea* represent the first opportunity to consider the legitimacy of *The Siskina* to modern practice, and to complete the exercise begun by Lord Nicholls in *Mercedes Benz*. In *The Siskina*, Lord Diplock said:[43]

> 'Since the transfer to the Supreme Court of Judicature of all the jurisdiction previously exercised by the court of chancery and the courts of common law, the power of the High Court to grant interlocutory injunctions has been regulated by statute. That the High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment, was first laid down in the classic judgment of Cotton LJ in *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30, 39-40, which has been consistently followed ever since.'

This is not a complete statement of the law. The reference to such relief being 'regulated by statute' is apt to mislead – and did mislead – the Court of Appeal when considering Section 24 of the BVI Act.[44] That section does not seek to set out the basis upon which injunctive relief is to be granted: if it did so intend, it would no doubt identify the relevant factors and criteria to be applied. Instead, the section expressly leaves the matter as wide as possible: *in all cases in which it appears to the court to be just or convenient so to do*. When considering if it is just or convenient to grant relief no doubt the court will be guided by established equitable principles but the granting of the injunction is not 'regulated' by the statute in any substantive sense.

In *North London Railway v Great Northern Railway,*[45] the court held that no injunction could be maintained to restrain a party (D) from continuing with an arbitration, the subject matter of which was being dealt with by both parties in court: continuing with a futile arbitration, which would amount to a nullity, could have no impact at all on the rights and interests of the applicant.[46] In this scenario, C can sit back and allow D to engage in a futile arbitration knowing that no harm will arise, which is appreciably different from the fundamental harm that may ensue in the absence of the grant of a freezing order. The two scenarios are not comparable.[47]

43 *The Siskina* [256E—F].

44 [18].

45 (1883) 11 QBD 30.

46 Characterised in that manner, it is hardly surprising that no injunction was maintained: see Brett LJ: 35–36, 38 & Cotton LJ 38–39.

47 Query whether an English court would be prepared to sit back and refuse to intervene on the same facts today.

In the wake of *The Siskina*, the House of Lords quickly rejected limiting the power to grant such relief to the presence of legal or equitable rights. In *Castanho v Brown & Root (UK) Ltd* (1981)[48] Lord Scarman referred to Lord Diplock's *dicta* (at page 256) and remarked:

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

In *British Airways Board v Laker Airways Ltd*[49] (1985), Lord Diplock (along with the other Law Lords) agreed with Lord Scarman's remarks.[50] *British Airways Board* is an important case in two respects. Firstly, Lord Diplock further resiled from his own comments in *The Siskina* when he accepted that the 'statement of principle in the stark terms in which I expressed it in The Siskina case'[51] needed to be qualified by the more flexible approach advocated by Lord Scarman in *Castanho;* that is, the power to grant such relief where it is appropriate to avoid injustice.

Secondly, Lord Scarman emphasised that his remarks in *Castanho* set out 'an approach and a principle which are of general application'.[52] The significance of the *Castanho* decision, and its departure from *The Siskina,* should not be diminished by pigeonholing its relevance to anti-suit injunctions.

In *South Carolina Insurance v Assurantie* (1987),[53] Lord Goff (Lord MacKay agreeing) stated:[54]

> 'I am reluctant to accept the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories. That power is unfettered by statute; and it is impossible for us now to foresee every circumstance in which it may be thought right to make the remedy available.'

Channel Tunnel Group v Balfour Beatty Construction (1993),[55] which concerned an *American Cyanamid* injunction, represented a substantial departure from Lord Diplock's observations in *The Siskina*. The approach in *Channel Tunnel* demands attention.

48 [1981] AC 557, 573C–E.
49 [1985] AC 58, 95.
50 [569D–E].
51 [81A–E].
52 [95].
53 [1987] AC 24, 40.
54 *South Carolina,* 44.
55 [1993] AC 334.

Firstly, in *Channel Tunnel,* Lord Browne-Wilkinson rejected the submission that Lord Diplock required that the interlocutory injunction be ancillary to a claim for substantive relief to be granted in England by an order of the English court. The question 'is whether the English court has power to grant the substantive relief not whether it will in fact do so'.[56]

Second, Lord Browne-Wilkinson expressly recognised that *The Siskina* had already been the subject of modification in subsequent House of Lords cases. He expressly agreed with the 'doubts' expressed by Lord Goff and Lord Mackay in *South Carolina* as to whether it was appropriate to place any categorisation on the availability of interlocutory injunctions when the statute itself is unfettered.[57]

Third, Lord Browne-Wilkson observed:[58]

> 'I add a few words of my own on the submission that the decision of this House in Siskina … would preclude the grant of any injunction under section 37(1) of the Supreme Court Act 1981, even if such 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 arbitration, 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.'

In *Channel Tunnel,* the focus was on finding a logical basis for maintaining the interim relief's connection with the underlying substantive claim even though that claim, contrary to Lord Diplock in *The Siskina*, was to be heard in a foreign court (or indeed a foreign arbitration). The solution adopted in *Channel Tunnel* placed emphasis on the claim being one which *could* be brought in England, even if in fact it was not. The public policy reasons for this approach are obvious and compelling.

In *Broadmoor Special Hospital Authority v Robinson* (2000)[59] Lord Woolf MR noted that Lord Diplock's *obiter dicta* in *The Siskina* should be 'applied with a degree of caution' since it 'is far from being an exhaustive statement of the extent of the court's powers to grant an injunction or as a guide as to who is entitled to bring proceedings to claim an injunction'. Lord Woolf MR went on to endorse as a correct statement of the law an extract from Spry's

56 *Channel Tunnel,* 342

57 Lord Keith agreed with Lord Browne-Wilkinson on this issue: [340G].

58 At 341.

59 [2000] QB 775 [20]-[23].

The Principles of Equitable Remedies that 'the remedy of injunction should be available whenever required by justice'.

Lord Scott in *Fourie v Le Roux* (2007) recognised the significant developments:[60]

> 'The practice regarding the grant of injunctions, as established by judicial precedent and rules of court, has not stood still since *The Siskina* [1979] AC 210 was decided and is unrecognisable from the practice to which Cotton LJ was referring in *North London Railway* … and to which Lord Diplock referred in *The Siskina*, at p256. Mareva injunctions could not have been developed and become established if Cotton LJ's proposition still held good.'

Similarly, Bannister J in *Black Swan*[61] (2010) considered it was open to him to decide whether there was any reason why he should not exercise the jurisdiction he considered he had, to continue the injunction.[62] Bannister J held that the BVI court had the power to grant a standalone freezing injunction in respect of shares in the two defendant BVI companies relying on what *Dicey, Morris & Collins*[63] has described as the 'powerful' reasoning of Lord Nicholls in *Mercedes Benz*:[64]

> 'And when *The Siskina* was decided Mareva injunctions were very much in their infancy. Since then the scope of Mareva relief has broadened: orders are made after judgment has been obtained as well as before; discovery may be ordered to render the Mareva injunction effective; and worldwide orders are now made, whereby the court assists a plaintiff to enforce the judgment in other countries. These developments, in a jurisdiction which even now is still in a state of development, make it easier than formerly to see the Mareva jurisdiction in its wider, international context.'

The BVI Court of Appeal in *Sonera Holdings BV v Cukurova Holdings AS* (2015)[65] also understood the scope for development, where the current Chief Justice remarked:

> 'The jurisdiction of the court to grant injunctions where the justice of the case so requires in the exercise of its equitable jurisdiction is so well established that no treatise as to its source need be given, save to say that it is a remedy developed by the courts of equity for the purpose of relieving against a wrong where no remedy at law would be effective for righting it.

60 [2007] 1 WLR 320 [30]. It is plain that Lord Scott's statement about the development of the Mareva injunction being inconsistent with Cotton LJ's proposition remaining good law cannot be a reference simply to the statutory intervention of s25 of the CJJA 1982. See also *Kazakhstan Kagazy v Zhunus* [2016] EWHC1048 (Comm) at [58] per Leggatt J.

61 Decided in 2010.

62 [10].

63 *Dicey, Morris & Collins* (15th edn) at [8-030]; *Mercedes Benz* 308A–B.

64 [11]–[12].

65 BVIHCMAP 2015/005 at [6] per Peirera CJ.

> Section 24(1)12 of the Supreme Court Act merely provides that the court is also empowered to grant interim injunctive relief 'in all cases in which it appears to the Court or Judge to be just or convenient'. *This is a discretionary power expressed in the widest of terms and for good reason as the concept of what is just and convenient must remain relevant and adaptable to changing times and new challenges which the courts may be called upon to address.* In large measure, the principles on which a court may grant anti-suit injunctions, and in similar respect anti-arbitration injunctions, are fairly well settled. Much depends on the circumstances. Therefore, whether or not such relief should be granted falls to be considered on a case by case basis.' (emphasis added)

In *Cartier International v BSB* (2017),[66] the Court of Appeal rejected any suggestion that the power to grant an interlocutory injunction was immutable. It endorsed both the rejection by Lord Woolf MR in *Broadmoor* of *The Siskina dicta* being an exhaustive statement of the extent of the court's powers,[67] and instead sanctioned the much wider and flexible description of that power summarised in Spry.[68]

In *Koza Limited v Koza Altin Isletmeleri AS* (2020),[69] the English Court of Appeal was prepared to grant a freezing order 'whose purpose is to preserve the value of the company in favour of a party who has a legitimate interest in preserving its value'.[70] The freezing order was to restrain the subsidiary, Koza Ltd, from dealing with its own assets by funding an arbitration in which it was involved. The parent company, Koza Altin, had a legitimate interest in how the subsidiary used its assets since that would affect the value of its shareholding in the subsidiary. A clearer example of the broad application of equitable relief inherent in a freezing order would be hard to envisage.

This trend of progressive and forward-thinking judicial development of the law came to an unexpected halt when the Court of Appeal in *Broad Idea 2* wrongly interpreted *Channel Tunnel* as reaffirming the reasoning in *The Siskina* to require not just a pre-existing cause of action *'recognised by English law'*, but also that D has been *'duly served'*. It is wrong to read into *Channel Tunnel* a requirement that interlocutory relief can only be granted by the court if it is against a party subject to the substantive claim and who has been duly served in that court's jurisdiction.

Lord Browne-Wilkinson could not have put it clearer:

66 [2017] RPC 3.
67 [47].
68 [47]–[48].
69 [2020] EWCA Civ 1018.
70 *Koza* at [82]–[83].

> 'Even applying the test laid down by the Siskina the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court or arbitral body'.[71]

Channel Tunnel does not require the BVI court to exercise jurisdiction over the substantive claim or that the freezing order must be limited to the individual or party who happens to be the substantive defendant. Bannister J recognised the point in *Black Swan*; *The Siskina* had to be read in the light of *Channel Tunnel* and the ability to grant freezing order relief in aid of proceedings taking place abroad.[72]

There are also many instances where courts have been willing to grant freezing orders absent any claim arising against the respondents, nor any intention to pursue a claim, drawing a distinction between the right to commence proceedings and the existence of a cause of action.[73] This represents yet another departure from the strict approach laid down in *The Siskina* requiring a pre-existing cause of action to underpin a freezing order application.[74]

Coming home to roost: the territorial issue

It is understandable how such a misunderstanding on the law of freezing orders can arise given the winding path of case law that must be navigated to arrive at the current practice. No one case succinctly tracks the developments nor sets out the current position of the law. This is not surprising given that the most active jurisdictions in this area enacted legislation to cut through the murky waters of *The Siskina*. BVI chose not to, instead finding a common law remedy – thereby presenting the Privy Council the first opportunity in 20 years to rule not only on the power issue but to clarify the current practice on the territorial issue.

Having established the correctness and strong judicial support of the approach of Lord Nicholls to the Power issue, the door is open to consider the territorial issue. Lord Mustill recognised this in *Mercedes Benz*; if there did exist a power to grant standalone freezing orders, as Lord Nicholls thought, the territorial issue would require further examination.[75]

Lord Mustill's rejection of a standalone freezing order falling within the injunction gateway appears premised on an understanding that the service-out gateways are and must be interpreted as limited to a substantive

71 At 343C.
72 [6].
73 [304F–305A].
74 *Ibid.*
75 *Ibid.*

claim asserting a right which is to be determined in proceedings before the English courts.[76] Once it is accepted that there is power to grant standalone freezing orders, it is unclear why such a limitation based on the assertion of *substantive* rights should be placed on the gateways. Accepting the rationale for a standalone freezing order as the protection of the integrity of the enforcement process, C's rights of effective access thereto, and cognisance of the modern financial world means Lord Mustill's rigid approach is unworkable. The approach adopted by the Court of Appeal in *Broad Idea* emphasises why such an approach should be avoided.

Lord Mustill in *Mercedes Benz* emphasised that the purpose of the gateways was to assert jurisdiction over the resolution of a claim. The practice in most jurisdictions is that a claim form or other appropriate document[77] is issued, claiming standalone interim relief including freezing order relief, so it follows that is the dispute over which the court granting service out of the jurisdiction asserts control; not the substantive action taking place in a different jurisdiction. It was on this basis that Lord Nicholl in *Mercedes Benz* concluded that a Mareva injunction in aid of a prospective judgment being sought from another court is an injunction within the meaning of injunction service out gateway.

Lord Nicholls' approach to the territorial issue is logical and persuasive. In fact, Bannister J in *Black Swan* at [7] felt that Lord Mustill in *Mercedes Benz* could be read to endorse the approach of Lord Nicholls if relief against a defendant not subject to the territorial jurisdiction of the court was available. Certainly, the point was left open. Bannister J held:[78]

> 'There is therefore high authority (*Mercedes Benz*) that in the absence of a provision to the effect of section 25 the court may not grant a freezing order in aid of foreign proceedings against a defendant who is not subject to the court's *in personam* jurisdiction. There is also high authority (*Mercedes Benz, Fourie v Le Roux*) that the question whether a freezing order should be granted in aid of foreign proceedings against a defendant who is subject to the court's jurisdiction is open – in other words, that that question is not decided by *The Siskina*, which was not dealing with that set of facts.'

76 *Mercedes Benz* at 301G-H.

77 The original practice for *Black Swan* injunctions was to use a fixed date claim form. Bannister J directed that this practice should cease and thereafter adopt a notice of application as being the originating process. BVI civil procedure rules require a notice of application to be used where interim relief is sought prior to proceedings being commenced. The use of an application as an originating process is not an alien practice in the BVI and is required for commencing proceedings under the Insolvency Act, 2004 by virtue of the applicable Insolvency Rules, 2004. However, by adopting a sensible practice direction issued by a Judge of the Court, the claimant in *Broad Idea* found itself shut out by the Court of Appeal from serving out its freezing order.

78 [8] and [9].

Learning to fly

The law no longer ascribes to the fiction that judges do not make law. The freezing order is judge-made, similar to *Norwich Pharmacal* relief[79] and anti-suit injunctions. So is the interpretation of the injunction gateway to exclude standalone freezing orders. The interpretation in *The Siskina* and *Mercedes Benz* is inconsistent with the plain and natural meaning of the words used in the gateway, and strained because it seeks to exclude that which naturally falls within it. It is also an interpretation reached at a time when freezing orders were in their infancy and limited in scope, when judges held a different attitude to the 'exorbitant' nature of the service-out jurisdiction. As the Supreme Court indicated in *Abela v Baadarani*,[80] these gateways are now much more a matter of what is pragmatic for the sensible resolution of an international dispute. Closing the door on the ability to serve a standalone freezing order out of the jurisdiction is anything but pragmatic in the fight against international commercial fraud.

If the power to grant standalone injunctions exists (as it did in the BVI before the amendment to the BVI Act), then it would be eminently sensible to have the ability to serve such an injunction out of the jurisdiction. The only potential obstacle is a matter of judicial interpretation.

The position in Jersey is especially relevant to judicial intervention on this issue. It is the only jurisdiction that did not consider itself bound by *Mercedes Benz*. On that basis, Jersey was able to depart from the majority's reasoning on the territorial issue, recognise the existence of standalone freezing orders *and* serve them out of the jurisdiction.

The Jersey Court of Appeal in *Solvalub Limited v Match Investments Ltd*[81] noted that the majority in *Mercedes Benz* left open the power issue and was persuaded by Lord Nicholls' reasoning. The reasoning in *The Siskina* is no longer good law in Jersey.

The Royal Court in *Krohn v Varna Shipyard (No 2)* accepted that such orders could be served out of the jurisdiction[82] and rejected a submission that this was a point for the Rules Committee.[83] In *Krohn,* the Royal Court was influenced by the same 'sound reasons of judicial policy'[84] accepted by Le Quesne JA in *Solvalub*, and which found favour in *Black Swan*; the desire

79 Justice Jack in *A Foreign Representative in Foreign Insolvency Proceedings v Five Registered Agents* BVIHC (COM) [Redacted] (15 June 2020) confirmed that *Norwich Pharmacal* orders survive *Broad Idea* as such relief is not parasitic on the underlying cause of action.

80 *Abela v Baadarani* [2013] 1 WLR 2043.

81 (1997/98) 1 OFLR 152. Referred to approvingly in *Black Swan.*

82 *Krohn v Varna Shipyard (No 2)* quoting with approval Lord Nicholls in *Mercedes Benz* at pp312F – 314A.

83 *Krohn v Varna* at pp490-491.

84 {pp 491–492}.

to avoid (1) a breach of comity with courts in other jurisdictions if Jersey refused to lend assistance by providing the standalone relief; and (2) an adverse reputation as an international financial centre. The Royal Court also stated that one of the:

> 'primary pillars of judicial policy is moral principle. The Court exists to administer justice and to do what is right between litigants. Having developed a remedy which is available to prevent litigants in Jersey from evading justice by moving their assets beyond the reach of the law, it would be a curious state of affairs if that remedy were denied to foreign litigants.'

The freezing order jurisdiction has been developed to prevent abuse of the ever-increasing ability of defendants to move assets rapidly from one jurisdiction to another. On this basis, the Royal Court held that the words of the injunction gateway were to be given their plain and natural meaning. *Krohn* was confirmed in *State of Qatar v Al Thani*.[85]

Bannister J readily endorsed the same policy reasons as to why offshore financial centres, such as the BVI, should be able to offer such relief:[86]

> 'Why important offshore financial centres, such as Jersey and the BVI, should be in a position to grant such orders in aid where necessary. The business of companies registered within such jurisdictions is invariably transacted abroad and disputes between parties who own them and others are often resolved abroad. It seems to me that when a party to such a dispute is seeking a money judgment against someone with assets within this jurisdiction, it would be highly detrimental to its reputation if potential foreign judgment creditors were to be told that they could not, if successful, have resort to such assets unless they were to commence substantive proceedings here in circumstances where, in all probability, they would be unable to obtain permission to serve them abroad – thus presenting them with an effective brick wall or double bind of the sort so deplored by Lord Nicholls in *Mercedes Benz*.'

Broad Idea 1 dismisses the relevance of the Jersey experience since that jurisdiction did not consider itself bound by *Mercedes Benz;* but, as we have already addressed, neither was the BVI so bound. This was a missed opportunity by the BVI Court of Appeal. A strong message could have been sent to directors and shareholders of BVI incorporated companies that simple territorial absence from the BVI would not be enough to defeat the Court's *in personam* jurisdiction over them.

Almost all other key jurisdictions enacted legislation that then severely curtailed the relevance and impact of *The Siskina* and its judicial evolution.

85 [1999] JLR 118.
86 [15].

In the UK, this was section 25 of the CJJA 1982, enacted to ensure that the UK complied with its obligations under the Brussels Convention.[87] This involved making available relief in aid of foreign proceedings in EU Member States. That provision was extended by Order in Council[88] to include jurisdictions other than Member States.

In 2009, Hong Kong resiled from *Mercedes Benz* by introducing section 21M of the High Court Ordinance (Cap 4) which provided that a receiver may be appointed or other interim relief granted in relation to proceedings outside of Hong Kong which 'are capable of giving rise to a judgment which may be enforced in Hong Kong'. This appears to be a legislative adoption of Lord Nicholls' reasoning in *Mercedes Benz* and a departure from the majority's reasoning by the jurisdiction in which the Privy Council sat as the highest court.

The Cayman Islands similarly departed from *The Siskina* and *Mercedes Benz* by enacting section 11A of the Grand Court Law on substantially the same terms as the Hong Kong legislation. The adoption of statute serves no purpose if that statute is then read to limit equitable rights. It is for this reason that the case law needs to catch up with practice.

Will a phoenix rise from the ashes?

The pending judgment from the Privy Council is its first opportunity since *Mercedes Benz* to consider the practice and applicability of standalone freezing orders. That the Privy Council is presented with this opportunity after the enactment in numerous jurisdictions of a statutory footing to grant standalone relief does not diminish its importance, given the recognition that such statute is not the limit of the available power. For jurisdictions that have not yet chosen to enact similar statutory power the decision will, it is anticipated, provide clear and up to date guidance on the nature, practice and potential for standalone freezing orders.

The realities of modern commerce, and ever-increasing sophistication of fraudsters, requires that equitable remedies adapt accordingly. Traditional ideas surrounding both the power issue and the territorial issue are long out of step with the modern world. No person should be able to take refuge in a black hole, nor should a CAD be enabled by a court to take advantage of using foreign corporate vehicles without liability for their acts – exactly what Lord Nicholls' dissenting judgment in *Mercedes Benz* sought to prevent. The next chapter in the development of the law of Mareva injunctions is eagerly awaited.

87 *ETI Euro Telecom v Republic of Bolivia* [2008] EWCA Civ 880; [2008] 2 Lloyds Rep 421 at [66]-[68] per Lawrence Collins LJ.

88 Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (as amended by the Civil Jurisdiction and Judgments Regulations 2009 (SI 2009/3131)).

STOP PRESS

This article was finalised in June 2021, a few months after the conclusion of the hearing before the Privy Council and a few months before delivery of the Board's judgment on 4 October. As the article concentrates on the 'Power Issue', and with the majority finding in favour of our client, the appellant, on the Power Issue, our position taken in this article on the Power Issue now enjoys judicial backing! The same cannot be said on the 'Territorial Issue' (concerning service out) on which the Privy Council was not persuaded. The judgment is available on the JCPC website (www.jcpc.uk/decided-cases/index.html [accessed 11 October 2021]); paras 101 to 102, in particular, are worth close attention for any practitioner contemplating an application for a freezing injunction.