IN THE COURT OF APPEAL OF BELIZE, A.D. 2010

CIVIL APPEAL NO. 23 of 2009

BETWEEN

LAURO REZENDE **Appellant**

AND

COMPANHIA SIDERURGIA NACIONAL
INTERNATIONAL INVESTMENT FUND LIMITED **Respondents**

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Michael Young SC for the appellant.
Eamon Courtenay SC for the respondent.

—

3 March, 20 October 2010.

MOTTLEY P

[1] On 11 June 2009, the claimants, now the respondents, filed a claim form against the defendant, now the appellant, a resident of Brazil. The claimants are seeking to recover funds which it is alleged that the defendant had fraudulently converted and caused to be paid into a Bank Account in New York which he controlled. The claimants also applied for an interim injunction against the defendant. On the same day, an interim injunction was granted by the Supreme Court against the appellant and Morgan Stanley Smith Barney LLC of New York in the United States who was also made a defendant. The defendants were restrained from transferring or disposing of:

> "(1) any or all of the assets of funds in account 40130209 held in the name of International Investment Fund Ltd. (IIF) at the Morgan Smith Barney LLC (as introducing broker) and of Citigroup Global Markets Onc. (as carrying broker) (2) any or all of the assets or funds held in any account in the name of Hago Overseas at the Morgan Smith Barney LLC (as introducing broker) and of Citigroup Global Markets Onc. (as carrying broker) (3) any or all of the assets or funds held in any account in the name of at the Morgan Smith Barney LLC (as introducing broker) and of Citigroup Global Markets Onc. (as carrying broker)"

This injunction was for 28 days.

[2] Pursuant to an application which was also heard on 11 June 2009, the court made the following order:

> "It is hereby ordered that the Claim Form dated the 11th of June 2009, Application Notice dated the 11th of June 2009, and the affidavits filed in support of the Application Notice shall be served out of the jurisdiction on the Defendant by sending the same by courier service to Lauro Rezende c/o R & r Partners, Av Lucio Costa 3606, Apto 403, Rio de Janeiro RJ 22630-011 and Lauro Rezende c/o Brief Carmen & Kelman LLP 805 Third Avenue, New York, NY 10022."

[3] On 25 June 2009 the respondents filed an application seeking an extension of the injunction which was renewed on 2 July 2009 until further order. The appellant filed an application which, after amendment, sought the following declaration and orders:

> "1. A Declaration that the Court had no jurisdiction to Order or permit that the Claim Form (and consequently the accompanying documents) be served out of the Belize jurisdiction

2. An Order that the Court has no jurisdiction to hear and/or determine the claim herein
3. An Order striking out the Claim Form
4. A Declaration that the Court had no jurisdiction to grant the Ex Parte Injunction orders of he 11th of June 2009
5. An Order vacating the Injunction for want of jurisdiction
6. Alternatively, that the court should not exercise its jurisdiction to hear and/or determine the claim herein
7. An Order to set aside, discharge and vacate the ex-parte injunctive order dated 11th June 2009
8. An Order to set aside service of the Claim Form and the Order for service of the Claim Form both dated 11th June 2009"

[4] Counsel for the respondents confirmed that no application had been made for leave to serve the claim form out of the jurisdiction. In delivering its reserved judgment, the court refused to grant the declaration and orders sought in the prayer (one through seven) and dismissed the application. The court set aside the service of the claim form and ordered that the respondents make an application for leave to serve the claim form out of the jurisdiction.

[5] On 11 November 2009 the appellants filed a Notice of Appeal. Grounds 2, 3, 4 which were argued together are set out below:

"(2) Where the Defendant is neither within nor resident in the Belize jurisdiction the Court has no jurisdiction to entertain an action in personam against a Defendant unless and until the Claimant has first applied for and obtained leave under Part 7 of the BCPR to serve the originating process on the Defendant out of the Jurisdiction and therefore the Learned Judge erred in not granting the application for vacating the Injunctive Orders.

(3) The BCPR (including particularly Part 17) is to be interpreted subject to the requirement that in cases where

the Defendant is resident outside of the jurisdiction leave of the Court for service of the Claim Form outside of the jurisdiction must first be obtained to issue an injunction against a Defendant not within not resident in the Belize jurisdiction.

(4) The Court cannot grant any injunction, Mareva Relief, freezing order or interim remedy against a foreign resident unless the Defendant is "amenable to the jurisdiction of the Court" in respect of the substantive cause of action."

The Appellant is contending that the Court had no jurisdiction to issue injunctive relief against the Appellant as he was resident outside of Belize and, in the circumstances, the Court had no jurisdiction to entertain an action in personam against him "unless and until leave to serve the originating process outside the jurisdiction" had been applied for and had been obtained.

[6] The service of the claim form out of the jurisdiction of the Supreme Court of Belize is governed by Part 7 of the Supreme Court (Civil Procedure) Rules 2005. Rule 7.1 which sets out the scope of the Rule provides as follows:

"7.1 (1) This Part contains provisions about-

(a) the circumstances in which court process may be served out of the jurisdiction; and

(b) the procedure for serving court process out of the jurisdiction."

[7] Rule 7.2 sets out the circumstances in which a claim form may be served out of the jurisdiction. It states as follows:

"7.2 A Claim Form may be served out of the jurisdiction only if-

(a) Rule 7.3 or 7.4 allows; and

(b) the Court gives permission

This provision is restrictive in the sense that, for a Claim Form to be served out of the jurisdiction, it must fall within the provision of Rule 7.3 and 7.4.

Even though the claim itself falls within the provisions of Rule 7.3 and 7.4 the over arching requirement is that the permission of the court is required. These provisions are cumulative and both requirement must be fulfilled.

[8] The rationale behind this Rule may be found in the judgment of Cotton L J with whom Bowen L J and Fry L J agreed, in **In re Busfield Whaley v Busfield 32 Ch.D.12**3 where at p. 130 he said:

> "The question is whether the Court can order service of an Originating Summons on a trustee who is out of the jurisdiction. Service out of the jurisdiction is an interference with the ordinary course of the law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction. If an Act of Parliament gives them jurisdiction over British subjects wherever they may be, such jurisdiction is valid, but apart from Statute a Court had no power to exercise jurisdiction over any one beyond its limit."

In my view, at common law, the Court of Belize has no jurisdiction to entertain an action in personam against a defendant who is not in Belize.

[9] Almost a century later, the House of Lords had occasion to comment on the practice of service out of the jurisdiction in **The Siskina [1979] AC 210**. In his judgment at p. 823 Lord Diplock said:

> "The general rule is that the jurisdiction of the English court over persons is territorial. It is restricted to those on whom its process can be served within the territorial limits of England and Wales. To this general rule there are some exceptions. These are now to be found in RSC Ord 11 which has statutory force by virtue of s 99 of the Supreme Court of Judicature (Consolidation) Act 1925. RSC Ord 11 permits the High Court to grant leave to a plaintiff to serve its process on a person outside the territorial limits of England and Wales in those cases, but only in those cases, that are specified in sub-paras (a) to (o) of r 1(1) or in r 2.

> Rule 2 deals with contracts that contain an express term conferring jurisdiction on the High Court. It is not germane to the instant appeal.
>
> In several of the cases specified in sub-paras (a) to (o) the jurisdiction exercisable over foreigners by the High Court is wider than that which is recognized in English law as being possessed by courts of foreign countries. These are 'exorbitant' jurisdictions which run counter to the normal rules of comity among civilized nations. For this reason it has long been held that where there is any room for doubt as to their meaning the provisions of the sub-paragraphs are to be strictly construed in favour of the foreigner: **The Hagen ([1908] P 189 at 201, [1908-10] All ER Rep 21 at 26**), per Farwell LJ; and it is in my view equally well settled now that it is not permissible in any action commenced by service of process on a person out of the jurisdiction to litigate any claim that does not fall within one or other of sub-paras (a) to (o): **Holland v Leslie; Waterhouse v Reid; Total Oil Great Britain Ltd. V Marbonanza Compania Naviera SA** (an unreported decision of the Court of Appeal)."

It should be noted that Lord Diplock went on to point out that there was nothing alleged by the plaintiff on which to found an action with the ..... of the High Court which would enable it to grant a Mareva injunction.

[10] Lord Diplock was in fact pointing out that there was indeed need that a valid claim for substantive relief must exist before the Mareva injunction could have been granted.

[11] Section 18(1) of Supreme Court of Judicature Cap 91 gives the Supreme Court in Belize "all the jurisdiction, powers, and authorities whatever possessed and vested in the High Court of Justice in England…….as are by the Supreme Court of Judicature (Consolidated) Act 1925 vested in the High Court of Justice in England.

[12] The jurisdiction of the Courts in England in respect of actions in personam may be found in Volume 7 of Halsbury's Laws 3rd Ed. At page 6. There it is states:

> "The English courts have jurisdiction (subject to the exceptions referred to below) to entertain an action in personam against any person who is within the jurisdiction at the time when the writ in the action is served upon him, however transitory his sojourn in England may be; and there are certain cases in which an action will be entertained against a person not within the jurisdiction, but in such cases leave must be obtained to serve the writ or notice of the writ abroad."

[13] In Dicey & Morris 12 Ed., the authors set out the jurisdiction of the English Court at Common Law where the defendant is not within the jurisdiction and show how it has been modified by statute and the rules:

> "If the defendant is not in England and served there with the writ and does not submit to the jurisdiction, the court has no jurisdiction at common law to entertain an action in personam against him. But this common law principle has been modified, first by sections 18 and 19 of the Common Law Procedure Act 1852, and later by the rules of the Supreme Court Ord. 11, under which in very many cases the court has a discretionary power to permit service of the writ or originating summons on a defendant irrespective of nationality who is out of England. Before there various cases are stated and discussed the following general points should be noted.
>
> (1) All the cases in this rule arise under Order 11, r.1 of the rules of the Supreme Court, made by judges under statutory authority
>
> (2) …
>
> Four cardinal points have been emphasized in the decided cases. First, the court ought to be exceedingly careful before it allows a writ to be served on a foreigner out of England. This

> has frequently been said to be because service out of the jurisdiction is an interference with the sovereignty of other countries, although today all countries exercise a degree of jurisdiction over persons abroad. Secondly, if there is any doubt in the construction of any of the heads of Order 11, r.1(1), that doubt ought to be resolved in favour of the defendant. Thirdly, since the application for leave is made ex parte, a full and fair disclosure of all relevant facts ought to be made. Fourthly, the court will refuse leave if the case is within the letter but outside the spirit of the rule."

[14] It is submitted by the appellant that leave to serve the claim out of the jurisdiction was in fact required and as this was not done the service was wrong and consequently the interim injunction ought to be set aside.

[15] In **Fourie v Le Roux [2007] 1 UKHL** 1 Lord Scott of Foscote after reviewing a number of authorities, observed:

> "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. In The Siskina the jurisdiction of the court over the defendant depended upon the ability of the plaintiff to obtain leave to serve the defendant out of the jurisdiction. Once the leave that has been granted had been set aside there was no jurisdictional basis on which the grant of the injunction could be sustained. On the other hand, if the leave has been upheld, or if the defendant had submitted to the jurisdiction, it would still have been open to the defendant to argue that the grant of a Mareva injunction in aid of the foreign proceedings in Cyprus was impermissible, not on strict jurisdictional grounds, but because such injunctions should not be granted otherwise than as ancillary to substantive proceedings in England."

[16] Leave to serve out of the jurisdiction is, in my view, a pre requisite for the granting of an injunction over a defendant who is not within the jurisdiction of the court. As Lord Scott pointed out that even if leave had been granted, but subsequently set aside, there would be no jurisdiction to continue an injunction which had been granted.

[17] In considering whether the jurisdiction of the court had been properly exercised, it is necessary to have regard to the circumstance which existed at the time when the judge granted the ex parte injunction. A claim form had been issued against the appellant who does not reside in Belize. The claim form was invoking the in personam jurisdiction of the Court in respect of a defendant who did not reside in Belize and who was not within Belize so that service of the claim form could be effected on him. This is borne out by the Order which the Court made on 11 June 2009. This is set out at para. 2. It shows the appellant's address as being either in Rio de Janeiro, Brazil or Manhattan, New York, United States of America.

Was that claim form valid? In my opinion the answer is no. A claim form may be served out of the jurisdiction only if Rule 7.3 and 7.4 allows and the Court gives permission (see Rule 7.2). The failure of the respondents to obtain the leave of the Court in accordance with Rule 7.2 makes the claim form invalid since, in my opinion, the in personam jurisdiction of the Court was not properly invoked. The result of this is that, at the time when the Court granted the injunction, there was no valid substantive claim before it on which the jurisdictional basis for the injunction could be founded.

[18] The respondents submitted that on 11 June 2009 the Court had jurisdiction to grant the ex parte injunction against the appellant even though the appellant was not residing in Belize and even though no leave had been obtained to serve the claim form outside the jurisdiction. In addition, they submitted that the Court had jurisdiction over the appellant by virtue of section 173 of the Supreme Court of Judicature Act, Cap. 91 which provides:

> ”Subject to any special disability to sue or be sued, any person, whether a foreigner or not, and whether a domiciled inhabitant of Belize or not, may take proceeding, or be proceeded against by action or other proceedings in the Court in its civil jurisdiction and the Court shall have full jurisdiction, power and authority to try, hear and determine the action or other proceeding and to proceeding to a final judgment or order and execution therein.”

[19] Counsel for the respondents contended that the respondent had a right to invoke the jurisdiction of the Court against the appellant who was a foreigner. He further submitted that “there is nothing in the section or the Act that the jurisdiction of the Court is subject to a condition that leave to serve out of the jurisdiction must first be had as a condition precedent for the conferral of jurisdiction by the Court over a foreigner.’

[20] In my view, section 173 enables any person even if he is a foreigner and irrespective of whether he was domiciled in Belize to institute civil proceeding in Belize. In addition the section also allows such person to be sued in any civil proceedings in Belize. The section refers to the Court having “full jurisdiction power and authority to try, hear and determine” any action.

[21] However this jurisdiction is limited by section 18 of the Supreme Court of Judicature Act to “all the jurisdiction, powers and authorities whatever possessed and vested in the High Court of Justice in England.” Lord Diplock in the Scobina (supra) stated that “the general rule is that the jurisdiction of the English Court over person is territorial.” His Lordship went on to point out that the process of the Court is restricted to those on whom such process can be served within the territorial limits of England.

[22] Section 173 is of no assistance in this matter.

[23] An attempt was made to invoke the provisions of Part 17 of the Rules. Part 17.1 states inter alia:

> “17.1 The court may grant interim remedies including-

(a) an interim injunction

(b) an order (referred to as a "freezing order")-

(i) Restraining a party from removing from the jurisdiction assets located there; or

(ii) Restraining a party from dealing with an asset whether located within the jurisdiction or not.

17.2.1 An order for an interim remedy may be made at anytime including-

(a) Before a claim has been made;

(b) After judgment has been given.

17.4(4) The Court may grant an interim order under this Rule as an application made without notice for a period of not more than 28 days unless any of these Rules permit or longer period if it is satisfied that:

(a) In a case or urgency, no notice is possible

(b) That to give notice would defeat the purpose of application."

It is said that the Court had jurisdiction to grant the interim relief before a claim had been made.

[24] It is accepted that in seeking an injunction the plaintiff is required to

> "At least point to proceeding already brought or proceeding about to be brought, so as to show where and on what basis he expects to recover judgment against the defendant" per Lord Bingham of Cornhill in Fourie's case.

[25] In **The Siskina**, Lord Diplock pointed out the right to obtain interlocutory relief was not a cause of action. He indicated that "the injunction sought … must be part of a substantive relief to which the plaintiff's cause of action entitles him."

[26] In **Castanho v Brown & Root (UK) Ltd [1981] AC 557** Lord Scarman, speaking of the grant of an anti-suit injunction, while advocating caution in the grant of such injunctions observed at p. 573

> "The way in which judges have expressed themselves from 1821 onward support 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."

A defendant who is outside of the Court's jurisdiction is not subject to the personam jurisdiction of the court.

[27] From these authorities I conclude that there must be a proper jurisdictional basis for the grant of such an injunction. Such a basis would exist if it can be shown that at the time when the injunction was granted the court had an in personam jurisdiction. At the time of the issue of the injunction, the appellant was resident in Brazil. For the reasons stated above, I am of the view that the Court did not have such a jurisdiction at the time.

[28] For these reasons, the appeal should be allowed and the injunction set aside. The appellant is to have his costs of the appeal and his costs before the judge.

MOTTLEY P

CAREY JA

[29] This appeal raises a narrow point of procedure. The question is this: does the Supreme Court have jurisdiction to entertain an action in personam against a defendant without leave first being had to serve the originating process on the defendant out of the jurisdiction?

[30] The matter comes about in this way: the respondents took out proceedings against the appellant in the Supreme Court of the State of New York. They claimed to recover dividend payments made by a Brazilian publicly traded railroad company in respect of shares owned by International Investment Fund Limited (the second respondent). It was alleged that the appellant fraudulently converted the dividends and caused them to be paid into a New York Bank Account which he controlled. The claim was dismissed on the ground of *farum non conveniens*. On 11 June 2009 the respondents filed a claim form in the Supreme Court of this country, against the respondent, a resident of Brazil and made an application for an interim injunction. The claim was based on the same circumstances which prompted the New York action but sought orders for several declarations.

[31] On 11 June 2009, Hafiz J granted the order for a Mareva injunction and at the same time ordered service out of the jurisdiction of the claim form and notice of the application for the injunction upon the appellant.

[32] The appellant filed an application and eventually an amended application for declarations and orders which, for completeness, I set out hereunder:

> "1. A Declaration that the Court had no jurisdiction to order or permit that the Claim Form [and consequently the accompanying documents] be served out of the jurisdiction.

2. An Order that the Court has no jurisdiction to hear and/or determine the claim herein.

3. An order striking out the Claim Form.

4. A Declaration that the Court had no jurisdiction to grant the Ex parte Injunction orders of 11 June 2009.

5. An Order vacating the Injunction for want of jurisdiction.

6. Alternatively, that the Court should not exercise its jurisdiction to hear and/or determine the claim herein.

7. An Order to set aside, discharge and vacate the ex parte injunctive order dated 11 June 2009."

The application came on for hearing before Hafiz J, who, in a well reasoned reserved judgment refused the orders/declarations 1 – 7 above. The appeal is against that determination.

[33] The challenge was based on the following grounds:

(1) Where the defendant is neither within nor resident in the Belize jurisdiction the court has no jurisdiction to entertain an action in personam against a defendant unless and until the claimant has first applied for and obtained leave under Part 7 of the BCPR to serve the originating process on the defendant out of the jurisdiction and therefore the Learned Judge erred in not granting the application for vacating the Injunctive Orders.

(2) The BCPR [including particularly Part 17 is to be interpreted subject to the requirement that in cases where the defendant is resident outside of the jurisdiction leave of the Court for service of the claim form outside of the

> jurisdiction must first be obtained to issue an injunction against a defendant not within nor resident in the Belize jurisdiction. The Court cannot grant an injunction in respect of the substantive cause of action.

[34] Mr. Young SC placed uncommon reliance on **The Siskina [1979] AC 210** in respect of ground (1).

I did not understand him at any time in the course of his submissions in this regard to refer to any rules of court prescribing the procedure for which he was contending. He called attention to the Supreme Court (Civil Procedure) Rules for this jurisdiction, namely Part 7 which deals with the service of court process out of the jurisdiction. His omission to mention any rule is clearly not due to inadvertence but to deliberate thought. It becomes necessary then to see what **The Siskina** did decide. The question at issue in that case was whether an application for a Mareva injunction could be maintained if it were free standing. As Bridge LJ in his dissenting judgment pointed out – "the cargo owners sought and obtained ex parte leave to serve the writ on the ship owners out of the jurisdiction on the sole ground that the claim for an injunction was sufficient to give the court jurisdiction under RSC Ord. 11 r 1 (1)(f). On application inter partes Kerr J set the order aside on the ground that the court had no jurisdiction to grant it. The cargo owners' appeal against that order turns solely on the question of jurisdiction."

The House of Lords allowed the appeal, thus restoring the orders of Kerr J and approving his reasoning, which Lord Diplock summarized in these words at p. 821

> "The cargo owners' claims for damages, whether based in contract or in tort, disclosed no cause of action in respect of which the court had any power to permit service of its process out of the jurisdiction under RSC Order. There was therefore no substantive claim to pecuniary relief within the jurisdiction of the

court to grant to which the Mareva injunction sought could be ancillary."

The ratio decidendi is encapsulated in the headnote –

> "An action against a foreign defendant could not be brought within r 1 (1)(i) by adding to a substantive claim for pecuniary relief not otherwise within RSC Ord 11 r 1, a claim for an interlocutory injunction to restrain the defendant from doing something in England pending judgment for the pecuniary relief. To come within r 1(1)(i) the injunction sought in the action had to be part of the substantive relief to which the plaintiff's cause of action entitled him; and the thing that it was sought to restrain the foreign defendant from doing in England had to amount to an invasion of some legal or equitable right belonging to the plaintiff in England and enforceable there by a final judgment for an injunction."

I would suggest that there can be no doubt that **The Siskina** provides no basis supportive of ground 1.

In this regard Mr. Young also cited **Fourie v LeRoux [2007] 1 All ER 1087** but the relevance of this case is not apparent. The factual situation was dissimilar to the instant case. There, the appellant for the Mareva injunction did not file originating process nor did he undertake to do so. Indeed, he had not formulated what he was minded to file. In the instant case, the respondents filed a claim form and applied for an interim injunction against the appellant. Lord Bingham identified what **Fourie v LeRoux** was all about at paras. 2 – 4:

> "2. Mareva (or freezing) injunctions were from the beginning, and continue to be, granted for an important but limited purpose: to prevent a defendant dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not a proprietary

remedy. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign: see Steven Gee, Commercial Injunctions, 5th ed (2004), pp 77-83.

3. In recognition of the severe effect which such an injunction may have on a defendant, the procedure for seeking and making Mareva injunctions has over the last three decades become closely regulated. I regard that regulation as beneficial and would not wish to weaken any of it in any way. The procedure incorporates important safeguards for the defendant. One of those safeguards, by no means the least important, is that the claimant should identify the prospective judgment whose enforcement the defendant is not to be permitted, by dissipating his assets, to frustrate. The claimant cannot of course guarantee that he will recover judgment, nor what the terms of the judgment will be. <u>But he must at least point to proceedings already brought, or proceedings about to be brought, so as to show where and on what basis he expects to recover judgment against the defendant.</u>

4. On his application to Park J, Mr. Fourie failed to do this. It follows that the judge was wrong to make the order he did. It also follows, in my opinion, that Mr. Jarvis QC, the deputy judge, was right to discharge it. There had been a clear neglect of the correct procedure, and the court should not absolve the defaulting party from the consequences of its neglect by maintaining the order in force: Siporex Trade SA v Comdel Commodities Ltd [1986] 2 Lloyd's Rep 428, 436."

I would agree with Mr. Courtenay SC that neither of these cases is in the least helpful in the instant case. I would reject this ground.

[35] As ground 2, Mr. Young SC put forward the proposition that the Civil Procedure Rules including particularly Part 17 is to be interpreted subject to the requirement that in cases where the defendant is resident outside of the jurisdiction, leave of the court for service of the claim form outside of the jurisdiction must first be obtained to issue an injunction against a defendant not within nor resident in the Belize jurisdiction.

[36] It is important to appreciate that that jurisdiction to hear and determine civil proceedings is conferred by statute and not by the rules of court made by judges. The judges cannot confer power on themselves. I doubt that authority must be cited for that view. Section 27(1) of the Supreme Court Act enacts as follows:

> "27(1) Subject to rules of Court, the Court may grant a mandamus or injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the Court to be just and convenient to do so."

Part 17 of the Rules (so far as relevant) deal with interim remedies. Rule 17.1(1) states as follows:

> "The Court may grant interim remedies including –
>
> (f) an order (referred to as a "freezing order") –
>
> (i) restraining a party from removing from the jurisdiction assets located there; or
>
> (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not;"

There is nothing in either the Act or the rules which requires that where the defendant is resident outside the jurisdiction, leave must first be obtained for service out of the jurisdiction in order to secure an injunction against a defendant not resident within the jurisdiction. The rule which deals with service on defendants resident outside the jurisdiction, is Rule 7. Rule 7.2 provides as follows: (so far as material)

> "7.2 A claim form may be served out of jurisdiction only if –
>
> (a) Rule 7.3 or 7.4 allows; and
>
> (b) The court gives permission.
>
> …
>
> 7.3 A claim form may be served out of the jurisdiction where –
>
> (a) a claim is made for a remedy against a person domiciled or ordinarily resident within the jurisdiction;
>
> (b) a claim is made for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction; or
>
> (c) …

The Rule then deals with claims in contract, in tort, claims regarding land, claims in trusts, admiralty proceedings and miscellaneous statutory proceedings. Since no point is seriously being taken that the instant proceedings are outwith the Rule, it is not necessary to rehash the detailed rules with respect to those matters. What is clear is that Rule 17 is clear and unambiguous and nothing in Rule 7 creates uncertainty or ambiguity

warranting the invoking of canons of construction. I would reject this ground as unsubstantiated.

[37] We come then to the final ground advanced by Mr. Young. He contended that the court had no jurisdiction to grant any injunction, Mareva Relief, freezing order or interim relief against a foreign resident unless the defendant was "amenable to the jurisdiction of the court."

[38] I fear that I have a difficulty with this ground. It was never ever suggested by Mr. Young in any shape or form that the claim did not come within the ambit of Rule 7.3(1), viz.

> "The Court may permit a claim form to be served out of the jurisdiction if the proceedings are listed in this Rule."

The declarations or at all events a declarations sought related to the ownership of certain shares which it was alleged the appellant had unlawfully obtained and converted to his own use and benefit. A claim sounding in tort is plainly within the list prescribed in rule 7.3. Unless there is some prohibition in law, the defendant is amenable to the jurisdiction of the Belize Court. Mr. Young was not able to identify any statutory prohibition nor any principle or authority to buttress his assertion.

[39] Mr. Courtenay brought to our attention section 173 of the Supreme Court of Judicature Act which is in these terms:

> "Subject to any disability to sue or be sued, any person, whether a foreigner or not, and whether a domiciled inhabitant of Belize or not, may take proceedings, or be proceeded against by action or other proceedings in the Court in its civil jurisdiction, and the Court shall have full jurisdiction, power and authority to try, hear and determine the action or other proceedings and to proceed to a final judgment or order and execution therein."

I would suggest that being a foreigner is not a status granting immunity from suit. In relation to civil proceedings, the foreigner is in no way different from a Belizean citizen. The Rules of Court do however provide a particular regime for service of such a person.

[40] I can see no reason therefore to disagree with the orders of Hafiz J. which I would affirm. The appeal should be dismissed.

_____
CAREY JA

MORRISON JA

The background

[41] The first named respondent, Companaia Siderurgica Nacional, ("CSN") is a Brazilian company which is listed on the Brazilian and the New York Stock Exchanges and has operations in Brazil, Europe and the United States of America ("the USA").

[42] The second respondent, International Investment Fund Limited ("IIF") is an International Business Company incorporated in Belize with registered offices in Belize City.

[43] The appellant, Lauro Rezende ("Rezende") is a citizen and resident of Brazil and a former employee of CSN.

[44] On 11 June 2009, CSN and IIF commenced action against Rezende in the Supreme Court of Belize by filing a claim form supported by affidavit. In the claim form as originally filed, CSN and IIF claimed various declarations relating to the ownership and control of IIF and the ownership of funds standing to the credit of a certain account held by IIF at the Smith Barney division of Citigroup Global Markets Inc., New York, USA, and orders that all funds in the said account be paid to CSN or its order and that such of those funds as had already been withdrawn by Rezende from the said account be repaid to CSN or its order. By an amendment made on 21 July 2009, the claim form was subsequently amended to include a prayer for injunctions restraining Rezende from "representing, claiming or asserting in Belize … that he is the lawful owner of IIF and/or any bearer shares of IIF" and from "acting, conducting or operating in Belize as if he is the lawful owner of IIF and of any bearer shares issued by IIF".

The orders made by Hafiz J

[45] On 11 June 2009, on an ex parte application made by CSN and IIF, Hafiz J granted interim injunctions restraining Rezende and his agent from transferring, assigning, pledging or otherwise disposing of any of the funds in the said account for a period of 28 days. At that hearing an oral application was made to the judge for substituted service of all documents used at the hearing on Rezende in Brazil and his attorneys in the USA. On 2 July 2009, Hafiz extended the interim injunctions until judgment or further order.

[46] However, no application was made to the judge, whether orally or in writing, for permission to serve the claim form out of the jurisdiction. Rezende therefore took the position that, in the absence of an order granting such permission, the court had no jurisdiction to grant or indeed to entertain the ex parte application. By an amended notice of application for court orders dated 22 July 2010, Rezende accordingly applied to the court for declarations that, inter alia, Hafiz J had acted outwith her jurisdiction by granting the ex parte injunction on 11 June 2009 and by ordering or permitting the claim form and accompanying documents to be served outside of Belize. As a consequence,

Rezende also sought an order vacating the injunction orders made on 11 June 2010.

[47] This application was heard by Hafiz J on 28 July 2009 and, in a considered judgment dated and handed down on 17 September 2009, the judge ruled that, while it appeared that she had had no power to grant the oral application for substituted service in the absence of prior permission to serve the claim form out of the jurisdiction, she did have the requisite jurisdiction to grant the ex parte injunctions, which she therefore declined to vacate.

The appeal

[48] By his amended grounds of appeal, Rezende challenges Hafiz J's orders on three bases, as follows:

> "(1) Where the Defendant is neither within nor resident in the Belize jurisdiction the Court has no jurisdiction to entertain an action in personam against a Defendant unless and until the claimant has first applied for an obtained leave under Part 7 of the BCPR to serve the originating process on the defendant out of the jurisdiction and therefore the Learned Judge erred in not granting the application for vacating the Injunctive Orders.
>
> (2) the BCPR [including particularly Part 17] is to be interpreted subject to the requirement that in cases where the defendant is resident outside of the jurisdiction leave of the Court for service of the claim form outside of the jurisdiction must first be obtained to issue an injunction against a Defendant not within nor resident in the Belize jurisdiction.
>
> (3) The Court cannot grant any injunction, Mareva Relief, freezing order or interim remedy against a foreign resident unless the Defendant is 'amenable to the jurisdiction of the Court' in respect of the substantive cause of action."

The issue

[49] Stripped to its essentials, the appeal therefore raises, as Carey JA has observed in his judgment (at para. [27] above), "a narrow point of procedure", and I accept and gratefully adopt his formulation of the issue, with a slight amendment, in the following terms:

> "…does the Supreme Court have jurisdiction to entertain an action *in personam* against a defendant [for service out of the jurisdiction] without leave first being had to serve the originating process on the defendant outside of the jurisdiction?"

[50] Or, to put the question another way, does an order made on the basis of a claim form issued against a defendant who is not ordinarily resident or domiciled in Belize have any validity in the absence of a prior order granting permission for the claim form to the served out of the jurisdiction? Underlying these beguilingly simple questions is a wealth of learning going back to at least the nineteenth century and going to the heart of the fundamental issue of the basis of the court's jurisdiction over individuals (or, to put it in traditional terns, its *in personam* jurisdiction).

The submissions

[51] Mr Young SC for Rezende submitted that the court had no jurisdiction to grant the injunctions, basing himself on what he characterized as "the essential proposition that where a Defendant is resident outside of the Belize jurisdiction a Court has no jurisdiction to entertain an action *in personam* against the Defendant unless and until leave to serve the originating process of the jurisdiction has been applied for and obtained by the Claimant." In support of this proposition, Mr Young referred us to the provisions of the Supreme Court of Judicature Act, ("the Act"), the Supreme Court (Civil Procedure) Rules 2005 ("the CPR") and to a number of English authorities, chief among them the decisions of the House of Lords in **Siskina (Owners of**

cargo lately laden on board) and others v Distos Compania Naviera SA, 'The Siskina' [1979] AC 210 and **Fourie v Le Roux [2007] 1 All ER 1087.**

[52] On the basis of the statutory provisions, the rules and the authorities, Mr Young submitted that before a court in Belize can have jurisdiction to consider or grant an injunction against a person not in the country and not ordinarily resident or domiciled in the country, leave to serve the claim out of the jurisdiction must first be sought and obtained. Since in the instant case leave was neither applied for nor granted for service of the claim form out of the jurisdiction, Hafiz J had no jurisdiction to grant the injunctions, which were therefore void from the beginning and could not thereafter be renewed or continued.

[53] Mr Courtenay SC for CSN and IIF submitted that Hafiz J's jurisdiction to grant the injunction derived from the provisions of the Act (sections 27 and 173) and the CPR (in particular, rule 17.2). He submitted further that none of the authorities relied on by Mr Young established that the jurisdiction of the Supreme Court of Belize over a foreigner is dependent on leave to serve a claim form out of the jurisdiction being first had and that Hafiz J had therefore correctly distinguished them. Mr Courtenay accordingly submitted that the injunctions granted and extended by the judge should not be disturbed in all the circumstances.

The question of jurisdiction

[54] To start at the beginning, the jurisdiction of the Supreme Court of Belize derives from the provisions of section 18 of the Act, which is in the following terms:

> "18.-(1) There shall be vested in the Court, and it shall have and exercise within Belize, all the jurisdictions, powers and authorities whatever possessed and vested in the High Court of Justice in England, including the jurisdictions, powers and authorities in relation to matrimonial causes and matters and in

respect of suits to establish legitimacy and validity of marriages and the right to be deemed natural-born Belizean citizens as are, by the Supreme Court of Judicature (Consolidation) Act 1925, vested in the High Court of Justice in England.

Provided that a decree declaring a person to be a natural-born Belizean citizen shall have effect only within Belize.

(2) Subject to rules of court, the jurisdictions, powers and authorities hereby vested in the Court shall be exercised as nearly as possible in accordance with the law, practice and procedure for the time being in force in the High Court of Justice in England.

(3) Where any jurisdiction, power or authority is by this Act vested in the Court, the grounds upon which the same may be exercised and other provisions relevant to the subject-matter in respect of which the jurisdiction, power or authority is so vested may be prescribed."

[55] Mr Young placed particular emphasis on the words "within Belize" in section 18(1), to make the point that the statutory language itself makes it plain that the jurisdiction of the court does not extend beyond the boundaries of Belize and it is indeed the case that, generally speaking, "courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction" (per Cotton LJ in **In re Busfield, Whaley v Busfield** (1886) 32 Ch. D. 123, 132). One practical result of this rule was that, since service "is normally a precondition to the exercise of jurisdiction" (The White Book Service 2005, Volume 1, para. 6. 17. 2), if a defendant was not within the jurisdiction and served there with the originating process (and did not submit to the jurisdiction of the court), the court had no jurisdiction at common law to entertain an action *in personam* against him (see Dicey & Morris, The Conflict of Laws, 12th edn, page 316).

[56] Thus in **The Siskina** (at page 254), Lord Diplock stated the position in this way:

> "The general rule is that the jurisdiction of the English courts over persons is territorial. It is restricted to those on whom its process can be served within the territorial limits of England and Wales".

[57] At common law, "there was no mode of serving process outside the jurisdiction of the Court and, indeed, no power to do so" (The Supreme Court Practice 1979, Vol. 1, para. 11/1/1). However, as Lord Diplock went on to point out in **The Siskina** (at page 254), the common law rule was modified in England by rules of court with statutory force permitting the court "to grant leave to a plaintiff to serve its process outside the territorial limits of England and Wales in those cases, **but only in those cases**, that are specified in [the rules]" (emphasis supplied)..

[58] While under the pre-CPR rules formerly applicable in Belize, the leave of the court was required before the issue of a writ intended for service out of the jurisdiction (The Supreme Court Practice, supra, O. 6, r. 7), there is no obvious requirement in Part 8 of the CPR, which deals with the method of commencement of proceedings, for the court's permission as a precondition to the issue of a claim form intended for service out of the jurisdiction. (Nor is any such requirement now to be found in the equivalent rule in England – see CPR 1998, Part 7.) The current rules governing service out of the jurisdiction are to be found in Part 7, which is concerned with "(a) the circumstances in which court process may be served out of the jurisdiction, and (b) the procedure for serving court process out of the jurisdiction" (rule 7.1(1)). A claim form may only be served out of the jurisdiction if the claim falls within the provisions of rules 7.3 or 7.4 and the court gives permission to the claimant (rule 7.2). Rule 7.3 then sets out the various kinds of proceedings in which service out of the jurisdiction may be permitted.

[59] Part 7 does not on the face of it address in any respect the method by which proceedings in the Supreme Court are commenced, which is, as stated

in the preceding paragraph, dealt with separately in Part 8 (rule 8.1 prescribing, the documents which a claimant must file in order to institute proceedings). Part 8 is not expressly subject in any respect to Part 7, although rule 8.11 does provide that after a claim form has been issued "it may be served on the defendant in accordance with Part 5 (Service of Claim Form) or Part 7 (Service out of the jurisdiction)."

The power to grant injunctions

[60] Section 27(1) of the Act provides as follows:

> "27(1) Subject to rules of court, the Court, may grant a mandamus or injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the Court to be just and convenient to do so."

[61] The relevant rules of court are now to be found in Part 17 of the CPR. Rule 17.1(1) provides that the court may grant an order (referred to as a 'freezing order') "(i) restraining a party from removing from the jurisdiction assets located there; or (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not." Rule 17.2(1) provides that such an order may be made at any time, including before a claim has been made (rule 17.2(1)(a)) and after judgment has been given (rule 17.2(1)(b)), although in the former case the court may only grant an order before a claim has been made in cases in which the matter is urgent (rule 17.2(2)(b)(i)) or "it is otherwise necessary to do so in the interests of justice" (rule 17.2(2)(b)(ii)).

[62] With regard to interim injunctions, rule 17.2 provides as follows:

> "17.2 (2) "Unless the court otherwise directs, a party applying for an interim order under this Rule must undertake to abide by any order as to damages caused by the granting or extension of the order.

(3) An application for an interim order under this Rule may in the first instance be made on 3 days notice to the respondent.

(4) The court may grant an interim order under this Rule on an application made without notice for a period of not more than 28 days (unless any of these Rules permit a longer period) if it is satisfied that –

(a) in a case of urgency, no notice is possible; or

(b) that to give notice would defeat the purpose of the application.

(5) On granting an order under paragraph (4) the court must –

(a) fix a date for further consideration of the application; and

(b) fix a date (which may be later than the date under paragraph (a)) on which the injunction will terminate unless a further order is made on the further consideration of the application.

(6) When an order is made under paragraph (4), the applicant must serve the respondent personally with –

(a) the application for an interim order;

(b) the evidence on affidavit in support of the application;

(c) any interim order made without notice; and

(d) notice of the date and time on which the court will further consider the application under paragraph (5) (a);

not less than seven (7) days before the date fixed for further consideration of the application.

(7) An application to extend an interim order under this Rule must be made on notice to the respondent unless the court otherwise orders.

(8) A person against whom an interim order is made or extended under this Rule shall be at liberty at any time to make an application to the court to discharge the interim order or vary its terms."

[63] On the face of these provisions, it would therefore appear that a judge of the Supreme Court of Belize has full and unconditional power by statute, supplemented by the relevant rules of court, to grant an interim injunction in an appropriate case. And this is indeed what Mr Courtenay submits, and what Hafiz J found (in reliance also, it should be said, on section 173 of the Act, which I shall have to consider further in due course – see paras. [71] – [74] below). But, Mr Young maintains, this was not an appropriate case, for the reason that, permission to serve the claim form out of the jurisdiction not having been sought and obtained before the grant of the interim injunction, the judge lacked jurisdiction to grant an injunction and, indeed, to make any order. In order to determine this question, it is therefore necessary to consider in greater detail a few of the relevant authorities.

[64] In **The Siskina**, an interlocutory injunction had been granted restraining a foreign defendant from disposing of certain insurance proceeds in England. The issue on appeal was whether the judge had had jurisdiction under the

applicable rules (Order 11, r. 1) to grant leave to the plaintiff to serve the proceedings on the defendant out of the jurisdiction. The House of Lords held that leave ought not to have been granted, because the case did not fall within the rules permitting service out of the jurisdiction. Lord Diplock, with whose judgment the other members of the court agreed, said (at page 254) that section 45(1) of the Judicature Act 1925 (which is the virtually exact equivalent of section 27(1) of the Act) "presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary". Thus the right to obtain an interlocutory injunction is not itself a cause of action, but "is merely ancillary and incidental to the pre-existing cause of action" (page 256). In the instant case therefore, since the claim could not be brought within the rules governing service out of the jurisdiction, the order granting leave for service of the writ on the defendant had to be set aside and it followed that there was not then any jurisdiction to grant an injunction.

[65] In the subsequent case of **South Carolina Insurance Co. v Assurantie NV [1987] 1 AC 24, 40**, Lord Brandon of Oakbrook, after referring to section 37(1) of the Supreme Court Act 1981 (the statutory successor to section 45(1) of the 1925 Act) and, among other cases, **The Siskina**, described it as " a basic principle…that, although the terms of section 37(1) of the Act of 1981 and its predecessors are very wide, the power conferred by them has been circumscribed by judicial authority dating back many years." And in **Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334, 360-361**, Lord Mustill said that "Although the words of section 37(1) and its forebears are very wide it is firmly established by a long history of judicial self-denial that they are not to be taken at their face value and that their application is subject to severe constraints". These developments are fully and authoritatively explored in the judgment of Lord Scott in **Fourie v Le Roux** (at paras. 25-47), upon which Mr Young placed great reliance.

[66] And finally on this point, Mr Young also referred us to The White Book Service 2007, Volume 1, under the rubric "Jurisdiction", where the following appears (at para. 25. 1. 10):

> "The Supreme Court Act 1981 s.37 (see Vol. 2, para. 9A-109) states that the High Court may by order, whether interlocutory or final, grant an injunction in all cases in which it appears to the court to be just and convenient to do so (s. 37(1)). Any such order may be made either unconditionally or on such terms and conditions as the court thinks just (s. 3792)). Where the court has in personam jurisdiction over the person against whom an injunction whether interlocutory or final, is sought the court has jurisdiction to grant it (Fourie v Le Roux [2007] UKHL, per Lord Scott para. 25)".

The instant case

[67] I must confess that I was initially (and for some time thereafter) attracted to Hafiz J's conclusion that she had jurisdiction to grant the interim injunction in this case. In the first place, the claim form issued on 11 June 2009 appeared to conform in all material respects to the requirements of rule 8.1 of the CPR and, as such, to have been validly issued. It thus appeared on the face of it to be sufficient to give the court jurisdiction to make any of the orders provided for by Part 17 of the rules. And secondly, in any event, the court would equally have jurisdiction in a proper case to grant an injunction or other interim remedy even before the filing of the claim form (rule 17.2(1) (a)). These factors taken by themselves therefore tended to suggest that, as Hafiz J put it (at para. 57 of her judgment), "the Rules [do] not contemplate that leave must first be obtained to serve the Claim Form out of the jurisdiction before the court could have jurisdiction to grant the injunction".

[68] However, despite (or perhaps because of) the apparent neatness of this solution to the jurisdictional question posed by this case, I have come to the view that the framers of the CPR could not have intended, by a side-wind

so to speak, to sweep away the well established limitations on the exercise of the power given to the court by section 27(1) of the Act. In this regard, I have been influenced by the fact that the CPR, which was issued by the Chief Justice with the concurrence of the judges of the Supreme Court by virtue of the rule making power given by section 95 of the Act, is in fact subsidiary legislation.

[69] But I have also been troubled by the manner in which Hafiz J sought to distinguish **The Siskina**, which was to say that that case was concerned with the question of whether or not leave should have been granted to serve the writ out of the jurisdiction, while the instant case is concerned with whether the court had jurisdiction to grant the interim injunction. However, Hafiz J nevertheless accepted that the issue of the need for permission to serve the claim form out of the jurisdiction was still relevant, but dealt with it in this way (at para. 59):

> "If and when the application is made for permission to serve the Claim Form then the question of jurisdiction will be addressed. If the substantive relief sought is not within **Rule 7.3 or 7.4 of the CPR** then the injunction granted will be discharged" (emphasis in the original).

[70] With the greatest respect to the judge, who was obviously reaching for a solution to a difficult (albeit narrow) problem within the context of the rules themselves, I do not think that this approach is either logical or fair to a defendant in these circumstances. For on this approach, the court would be empowered to grant (without notice) injunctive relief of significant scope against a defendant in respect of whom it might eventually turn out (most likely, sooner rather than later) that the court had no jurisdiction in the first place, because the case did not fulfill the criteria for the grant of permission for service out of the jurisdiction under rule 7.2 or 7.4 (which is, on a long line of high authority, a precondition of jurisdiction). This, it seems to me, is so startling a result, from both the conceptual and practical standpoints, that I cannot conceive that the startling result which Hafiz J's approach describes

can have been intended by the framers of the rules. Neither is this approach, in my view, an efficient use of judicial time.

[71] I have accordingly come to the view that the apparent amplitude of the language of section 27(1) and Part 17 of the CPR must be read subject to, and is therefore qualified by, the requirement that, in the case of a claim form that is intended for service out of the jurisdiction, permission must first be sought and obtained to serve the claim form out of the jurisdiction as a precondition to the grant of injunctive relief, pursuant to Part 17. In my view, any seeming inconvenience flowing from the implication of this requirement is substantially mitigated by the consideration urged by Mr Young, which is to say that there could be no possible objection to the court being moved in a single application for (a) permission to serve the claim form out of the jurisdiction and (b) interim injunctive relief in the terms sought.

Section 173 of the Act

[72] Mr Courtenay also urged upon us section 173 of the Act, which is in the following terms:

> "Subject to any special disability to sue or be sued, any person, whether a foreigner or not, and whether a domiciled inhabitant of Belize or not, may take proceedings, or be proceeded against by action or other proceeding in the Court in its civil jurisdiction (emphasis ours) and the Court shall have full jurisdiction, power and authority to try, hear ad determine the action or other proceeding and to proceed to a final judgment or order and execution therein."

[73] On the basis of this section, Mr Courtenay submitted that the Supreme Court had jurisdiction over Rezende, despite the country of his domicile (which was said to be Brazil). It was submitted that this section confirmed the breadth of the court's jurisdiction, which "could not be wider and more powerful" and, although it does not appear to have been the primary basis of

her decision, it is clear that Hafiz J accepted the submission that this section provided an additional basis for the conclusion that she had had jurisdiction to grant the interim injunction in this case.

[74] I have had the advantage of reading in draft the judgment prepared by the learned President in this case and I cannot better, and am therefore content to adopt, his views on the meaning and effect of section 137:

> "In my view, section 173 enables any person even if he is a foreigner and irrespective of whether he was domiciled in Belize to institute civil proceeding in Belize. In addition the section also allows such person to be sued in any civil proceedings in Belize. The section refers to the Court having 'full jurisdiction power and authority to try, hear and determine' any action."

[75] I therefore also agree with the President that the jurisdiction referred to in section 137 is limited by the provisions of section 18 of the Act and the general principle of the common law that the court's *in personam* jurisdiction is territorial (see para. [56] above).

Conclusion

[76] I would therefore answer the questions posed at para. [49] above, and in the alternative formulation, at para. [50] above, in the negative. That is to say, that an order granting injunctive relief against a defendant resident out of the jurisdiction without leave first having been obtained to serve the claim form out of the jurisdiction is thereby rendered a nullity.

[77] In the result, I would accordingly allow this appeal, with costs to the appellant to be agreed or taxed.

MORRISON JA