

CONVOY COLLATERAL LTD V BROAD IDEA

THE RETURN OF BLACK SWAN AND MORE?



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Summary

On 4 October 2021, an enlarged seven-member Board of the Privy Council handed down a majority judgment (4:3) in the case of *Convoy Collateral Ltd v Broad Idea International Ltd*.¹ It confirmed that the British Virgin Islands' ("BVI") court has jurisdiction to grant an injunction against a non-cause of action defendant based in the BVI in support of foreign proceedings.

However, the significance of the decision has more far-reaching consequences. This was not lost on Sir

Geoffrey Vos who, in giving the minority judgment, described the decision of the majority as a "ground-breaking exposition of the law of injunctions"² and an attempt at providing a "juridical foundation for the entire law of freezing and interlocutory injunctions"³.

Facts

In 2018, Convoy Collateral Ltd ("**Convoy**") applied to the BVI court for freezing orders against Broad Idea (a BVI company) and a director and shareholder of that company, Dr Cho. This was done in support of anticipated

proceedings against Dr Cho in Hong Kong. Convoy also sought permission to serve Dr Cho outside of the jurisdiction. Following an ex parte hearing, the BVI court granted the freezing orders and gave Convoy permission to serve out.

At the return date, Dr Cho objected to the leave that was granted to serve him outside the jurisdiction and applied to have the freezing order discharged on the basis that the BVI Court had no power to make orders against foreign persons outside its territory. The court agreed with Dr Cho and leave to serve out was set aside and the freezing order discharged. Convoy appealed this decision.

1 [2021] UKPC 24.

2 At [221].

3 At [223].

However, the Court of Appeal of the Eastern Caribbean Supreme Court dismissed *Convoy's* appeal. In doing so it went a step further. It overturned *Black Swan Investment ISA v Harvest View Ltd*⁴ and concluded that the BVI court had no power to grant a standalone freezing order unless there were also domestic proceedings claiming substantive relief.

Convoy appealed and the Privy Council had to consider two main issues:

- a) Whether the BVI court has jurisdiction and/or power to grant a freezing order where the respondent is a person against whom no cause of action has arisen, and against whom no substantive proceedings are pursued, in the BVI or elsewhere; and if so
- b) Whether any such jurisdiction and/or power extends to the granting of a freezing order in support of proceedings to which that person is not a party.

Judgment

The majority overturned or distinguished a number of previous Privy Council, House of Lords and English Court of Appeal decisions to hold that the granting of an injunction is not contingent on a pre-existing cause of action before a local court. As Lord Leggatt observed at [82]:

There is no principle or practice which prevents an injunction from being granted in appropriate circumstances against an entirely innocent party even when no substantive proceedings against anyone are taking place elsewhere.

Lord Leggatt also articulated that the justification for a freezing injunction was to enable enforcement of a judgment by preventing the dissipation of assets that may be used to satisfy it.⁵ In synthesising these principles, and after a comprehensive review of the

relevant case law, the majority held at [101] that a court with the power to grant injunctions can do so when the court has personal jurisdiction over a respondent and it is just and convenient to do so, provided that:

- i) the applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;
- ii) the respondent holds assets... against which such a judgment could be enforced; and
- iii) there is a real risk that, unless the injunction is granted, the respondent will deal with such assets... other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied.

Further explanation was also provided at [102] where it was held that while other factors were potentially relevant in determining whether to grant a freezing injunction or not, there were in fact no other restrictions “on the availability in principle of the remedy”.

Lord Leggatt observed that:

- a) The judgment does not need to be from a domestic court. The principle also applies to foreign judgments or other awards that can be enforced via the domestic court's powers;
- b) The judgment does not need to be against the respondent; and
- c) There is no requirement that proceedings in which the judgment will be sought have started. Indeed, the right to bring such proceedings does not even have to have arisen. It is sufficient that the court can be satisfied that a right to bring proceedings will arise, and that they will be brought

This marks a departure by the Board from the House of Lords decision in *The Siskina*⁶, which limited freezing injunctions to instances where there was also a cause of action for substantive relief.

Implications

This decision confirms that the BVI court has jurisdiction to grant a freezing order against a party over which it has personal jurisdiction and where no cause of action or other substantive proceedings are pursued against that party in the BVI or abroad.

It will be welcomed by claimant parties seeking to use a standalone freezing order to preserve the assets of a party based in the BVI in support of proceedings commenced and judgment obtained elsewhere, such as the English High Court

However, this case may well be remembered more for its summation (and arguable simplification) of the law of freezing orders at [101]-[102]. By reasoning from the foundational position that freezing injunctions exist to aid in the enforcement of judgments, the majority were able to sweep away impediments to obtaining any such injunctions (for example, the need to have a pre-existing cause of action which had arisen).

As a result, this decision reveals the advantageous flexibility of the common law that made the Mareva jurisdiction possible in the first place.

The benefits of the decision for claimant parties are therefore likely to go beyond the BVI. It will be interesting therefore to see which other courts bound by the Privy Council jurisdiction will follow *Convoy* when considering whether to grant standalone injunctions in support of proceedings commenced and judgment obtained elsewhere.

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4 (BVIHCV 2009/399) (unreported) 23 March 2010.

5 At [85].

6 [1979] AC 210.