Article

Privy Council Issues Landmark Decision on Freezing Injunction Jurisdiction

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In *Convoy Collateral Ltd v Broad Idea International Ltd and Cho Kwai Chee* [2021] UKPC 24, the majority judgment of Lord Leggatt in the Privy Council upheld the decision in *Black Swan*, overruling the Eastern Caribbean Court of Appeal, and decided that it was finally time to move on from *The Siskina*[1]. However, from a Bermuda perspective, while this clarification is welcome, issues remain regarding service of defendants outside the jurisdiction.

The applications for injunctive relief

Convoy brought proceedings in Hong Kong, claiming damages and other relief against Dr Cho, a Hong Kong resident, as well as other defendants not including Broad Idea. In the British Virgin Islands (BVI) Convoy applied separately for freezing injunctions against Dr Cho and against Broad Idea, a company located in the BVI.

As against Dr Cho, the obstacle facing Convoy was to identify a provision in the procedural rules of the BVI under which permission may be given to serve a claim form outside the territorial jurisdiction of the court, where the only relief claimed is a freezing injunction. The relevant rules in the BVI were in similar terms to those in Bermuda' RSC 1985 and allowed service out where: "*a claim is made...for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction.*"[2]

The Board decided that it was long-settled that the term "*injunction*" in the rule could only refer to an injunction as final substantive relief for the invasion of a legal or equitable right of the plaintiff and did not include a freezing injunction or other interlocutory injunction. Accordingly, the Board upheld the decision of the courts below that Dr Cho could not be brought within the jurisdiction of the BVI court by serving him abroad.

This question did not arise in relation to Broad Idea, which was located in the BVI and thereby amendable to personal service. The Board had to decide whether the Court of Appeal was right to overturn *Black Swan*. While there undoubtedly was personal jurisdiction over Broad Idea, no substantive proceedings had been brought against Broad Idea in the BVI. The purpose of the application of an interim freezing injunction was to support the claim in Hong Kong. Given the absence of a claim against Broad Idea in the BVI, was it right for the BVI court to grant the injunction sought?

Moving beyond *The Siskina*

Lord Diplock's judgment in *The Siskina* is generally considered the starting point for the proposition that interim injunctive relief could only be granted in support of substantive proceedings in the jurisdiction[3]. In *Convoy Collateral*, Lord Leggatt surveyed the history and development of freezing injunctions, emphasising the following:

i. Following *The Siskina*, interim Mareva relief was extended from foreign defendants to domestic defendants, a development subsequently recognised in the UK by section 37(1) Senior Courts Act 1981.

[1] [1979] AC 210.

[2] The rule in Bermuda is at Order 11, rule 1(1)(b) RSC 1985.

[3] The following passage from his judgment is usually cited: "*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 L.J. in North London Railway Co. v. Great Northern Railway Co. (1883) 11 Q.B.D. 30 , 39-40, which has been consistently followed ever since*".

ii. Marveva relief was extended to aid enforcement of a judgment already given: see *Stewart Chartering v Management SA (Practice Note)* [1980] 1 WLR 460.

iii. Interim Mareva relief was extended to non-cause of action defendants in the form of Chabra relief, named after *TSB Private Bank v Chabra* [1992] 1 WLR 231.

iv. To ensure compliance with Article 24 of the Brussels Convention[4], section 25(1) Civil Jurisdiction and Judgments Act 1982 was enacted in the UK (in force from 1987) empowering the Court to grant interim relief where proceedings are, or have been, commenced in another Contracting State; in 1997 this was extended to the rest of the world.[5]

v. The development of the practice of granting worldwide freezing injunctions, which began with Lord Hoffmann's judgment in *Bayer AG v Winter (No.2)* [1986] 357.

vi. The decision of the House of Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334. The claim was stayed pending arbitration and the claimants sought an interim injunction restraining the suspension of work pending that decision. The court rejected the defendants' argument, founded on *The Siskina*, that the court was precluded from granting an interlocutory injunction because it was not sought in aid of a claim for substantive relief which the court had jurisdiction to grant.

vii. The judgment of Lord Nicholls in *Mercedes Benz AG v Leiduck* [1996] AC 284, in which he provided a principled basis for the granting of interim Mareva relief in the following passage[6]: *"It is not so much relief appurtenant to a money claim as relief appurtenant to a prospective money judgment. It is relief granted to facilitate the process of execution or enforcement which will arise when, but only when, the judgment for payment of an amount of money has been obtained"*.

viii. The development of third party disclosure orders and *Bankers Trust*[7] orders. Their importance lies in the fact that the third party so ordered need not have invaded or threatened to invade any right of the claimant. In *Bankers Trust* cases the third party may be ordered to disclose information to assist in the location of assets.

ix. The development of website blocking orders. In *Cartier International v BSkyB* [2016] EWCA Civ 658, the Court of Appeal upheld the decision to grant injunctions against internet service providers (ISPs) to block the websites' selling of counterfeit goods. Again, the ISPs had not invaded or threatened to invade any right of the claimant.

In *Convoy Collateral*, the majority decided that these developments illustrate the flexibility of courts with equitable power to modify existing practice to changing circumstances. Three major changes since the 1970s were emphasised: the transformation in the ease and speed with which money and other assets could be moved around the globe; the globalisation of commerce and consequential growth in litigation with an international dimension; and the growth in the use of offshore companies.

The starting point was the construction of the language of the BVI statute giving the court power to grant an interlocutory freezing injunction: it could be granted by interlocutory order in all cases where it appeared just and convenient to do so[8]. There was no reason to read this language restrictively (as had been done in *The Siskina*), in particular there was no reason to presuppose the existence of a cause of action claiming substantive relief which the court has jurisdiction to grant.

There was no established practice to read the language restrictively. In *Channel Tunnel*, the House of Lords held that a court could grant interlocutory relief against a defendant over whom the court has personal jurisdiction where substantive proceedings are before an arbitral tribunal or foreign court.

Citing *JSC BTA Bank v Ablyazov (No,10)* [2015 UKSC 64], where the court referred to the rationale for granting interim freezing orders as "*the enforcement principle*", the majority judgment held that the primary purpose of granting a freezing order was to stop the injuncted defendant from dissipating property which ought to be the subject of enforcement if the claimant goes on to win the case. The rationale was not that injunctive relief was ancillary to the cause of action in the main proceedings.

Once this is accepted, there was no reason in principle to link the granting of an injunction to a cause of action. This decoupling was demonstrated by the ability to grant a freezing order after judgment was given (when the cause of action was extinguished).

Summarising the position the majority held that although other factors are potentially relevant to the exercise of the discretion whether to grant an interim freezing injunction, there are no other relevant restrictions on the availability in principle of the remedy. In particular:

[4] on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968

[5] This provision is of enormous breadth and has been used to grant worldwide freezing injunctions against defendants with no known assets in England and Wales: see *Republic of Haiti v Duvalier* [1990] 1 QB 202.

[6] Particularly important for common law jurisdictions (such as Bermuda) where legislation comparable to section 25(1) of the 1982 Act and a corresponding amendment to the procedural rules governing service of proceedings abroad have not been introduced, as was the case in *Leiduck*.

[7] Named after *Bankers Trust v Shapira* [1980] 1 WLR 1274.

[8] The language of (Bermuda's) section 19(c) Supreme Court Act 1905 is identical for these purposes.

i. There is no requirement that the judgment should be a judgment of the domestic court.

ii. Although it is the usual situation, there is no requirement that the judgment should be a judgment against the respondent.

iii. There is no requirement that proceedings in which the judgment is sought should yet have been commenced, nor that a right to bring such proceedings should yet have arisen: it is enough that the court can be satisfied with a sufficient degree of certainty that a right to bring proceedings will arise and that proceedings will be brought (whether in the domestic court or before another court or tribunal).

Significance of the decision in *Convoy Collateral*

The majority decision provides welcome clarity as to whether a freezing injunction against a defendant in aid of foreign proceedings is possible when no substantive claim is made against the defendant in proceedings before the domestic court. However, the difficulty remains for jurisdictions like Bermuda where the procedural rules have not been altered so as to allow for service out of the jurisdiction for a freezing injunction alone; as Sir Geoffrey Vos's dissenting judgment in *Convoy Collateral* clearly articulates, the Privy Council's decision in *Mercedes Benz AG v Leiduck* confines Order 11 to originating documents which set in motion proceedings designed to ascertain substantive rights. If Bermuda wishes to go a step further and permit service out of the jurisdiction for free-standing Mareva injunctions, it will likely need to pass its equivalent of the UK's section 25(1) Civil Jurisdiction and Judgments Act 1982 and adjust its procedural rules accordingly.

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